NO. 9 Original	TITLE United States of America, Plaintiff v. State of Louisiana, et al.

DOCKETED	COURT
December 19, 1982	Bill of Complaint

DATE	PROCEEDINGS AND ORDERS
May 24, 1982	Motion for relief from decree filed.
June 1, 1982	The Final Report of the Special Master with respect to the Louisiana Boundary Case is received and ordered filed. The objections to accountings previously filed are sustained to the extent recommended in the Report of the Special Master. All accountings required by the Court's Decree of June 22, 1981, have been made and, as supplemented by the ruling on the objections thereto, are now approved. The account submitted by the Special Master is approved and the balance owing to him shall be paid in equal shares by the United States and the State of Louisiana. The Special Master is discharged in this case insofar as the proceedings involve the controversy between the United States and the State of Louisiana. Marshall, J., OUT. (See printed order).
May 28, 1982	Opposition by the Solicitor General to motion for relief from decree filed.
June 7, 1982	DISTRIBUTED. 6-10. (Motion for relief from decree).
June 14, 1982	The motion of Mississippi for relief from the final decree in this case On December 12, 1960, is referred to the Special Master. Marshall, J., OUT.
Oct. 18, 1982	Motion of Special Master for Allowance of Interim Compensation and Expenses filed.
Oct. 25, 1982	DISTRIBUTED. 10-29. (Above motion of Special Master).
Nov. 1, 1982	The petition of the Special Master, Walter P. Armstrong Jr., for allowance of interim copensation and expenses, as set forth in the petition filed Oct. 18, 1982, is GRANTED, and it is ordered that the United States bear one half the costs and the States of Mississippi and Alabama each bear one quarter of the costs. Marshall, OUT.
Aug. 29, 1983	Motion of Special Master for allowance of fees filed.
Sept. 7, 1983	DISTRIBUTED. SL25P5 (Above motion).
Oct. 19, 1983	REDISTRIBUTED. 10/28. (Above motion).
Oct. 31, 1983	The motion of the Special Master for additional partial payment by Mississippi for services is granted and the Court approves payment of $12,500.00. Marshall J., OUT.
Apr. 9, 1984	Report of the Special Master received.
Apr. 11, 1984	DISTRIBUTED. 4-27. (Report of the Special Master).

(Over)

2-4-2

9 Original

Title

No.

DATE	PROCEEDINGS AND ORDERS
Apr. 30, 1984	The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with support briefs, may be filed by the parties within 30 days. Marshall, J., OU
Apr. 28, 1984	Additional compensation and reimbursement of expenses to the Special Master. (Petition for allowance of)
May 8, 1984	Amendment to petition for allowance of additional compensation and reimbursement of expenses to the Special Master filed.
May 8, 1984	DISTRIBUTED. 5-24. (Petition for allowance of additiona compensation and reimbursement of expenses to the Special Master).
May 29, 1984	The petition for allowance of additional compensation to the Special Master is granted and payments as requested in prayers 1, 2, and 3 are allowed. Further consideration of the remaining prayers is deferred until further order of the Court. Marshall, J., OUT.
June 11, 1984	Order extending time to file Exceptions to the Report of the Special Master to and including June 25, 1984 for all parties.
June 26, 1984	Exceptions to the Report of the Special Master by Alabama filed.
June 25, 1984	Exceptions to the Report of the Special Master by the Unite States filed.
June 26, 1984	Exceptions to the Report of the Special Master by Mississi filed.
Aug. 2, 1984	Reply brief for the United States filed.
Aug. 13, 1984	Reply brief of Alabama filed.
Aug. 10, 1984	Reply brief of Mississippi filed.
Aug. 15, 1984	Brief, amicus curiae, of the State of Alaska in opposition to the Exception of the United States filed.
Aug. 15, 1984	DISTRIBUTED. September 24, 1984. (Exceptions of the United States, Alabama and Mississippi to the Report the Special Master.)
Oct. 1, 1984	The Exceptions to the Report of the Special Master are set for oral argument in due course. Marshall, J., OUT
Oct. 11, 1984	Motion of Alabama for divided argument filed.
Oct. 19, 1984	CIRCULATED.
Oct. 29, 1984	The motion of Alabama for divided argument is granted. Marshall, J., OUT.
Nov. 26, 1984	ARGUED.

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(1)

No. 9, Original

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, ET AL.,
Defendants.

(Alabama and Mississippi Boundary Cases)

REPORT OF WALTER P. ARMSTRONG, JR. SPECIAL MASTER

Apr. 9, 1984

61 + foldout

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No. 9, Original

In the Supreme Court of the United States

October Term, 1963

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA,
Defendants.

(Mississippi and Alabama Boundary Cases)

REPORT OF SPECIAL MASTER

In its opinion in *U. S. v. Louisiana*, 363 U.S. 1, 4 L.Ed.2d 1025, 80 S.Ct. 961 (1960), the Court made it clear (Note 108) that it did not intend to settle by that opinion the location of the coastline of any state, which included Mississippi (Note 135) and Alabama (Note 139). The decree entered pursuant to that opinion 364 U.S. 502, 5 L.Ed.2d 247, 81 S.Ct. 258 (1960) likewise left this question open, saying only that:

> As used in this decree, the term 'coastline' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. (364 U.S. 503).

The decree contemplated possible agreement between the parties as to where the coastlines of Alabama and Mis-

sissippi actually lay; but no such agreement has been reached. On November 1, 1979 the State of Mississippi filed a Motion for Entry of a Supplemental Decree to settle the matter, and on February 22, 1980 the State of Alabama filed a similar motion. Subsequently, on January 17 and March 6, 1980 the United States filed cross-motions as to each state for the entry of a supplemental decree. By Order entered February 19, 1980 (444 U.S. 1064, 62 L.Ed.2d 746, 100 S.Ct. 1005) the motion of the State of Mississippi and the cross-motion of the United States in regard thereto were referred to the Special Master previously appointed by the Court in this case (395 U.S. 901, 23 L.Ed.2d 215, 89 S.Ct. 1737); and on March 17, 1980 similar action was taken as to the motion of the State of Alabama and the cross-motion of the United States as to that state (445 U.S. 923, 63 L.Ed.2d 755, 100 S.Ct. 1306).

The sole issue raised by these motions is whether the coastlines of the States of Mississippi and Alabama are the line of ordinary low water along the southern mainland and around certain islands adjacent thereto (known as the "barrier islands"), or whether the waters of Mississippi Sound which lie north of these islands are inland waters and those coastlines are therefore the line of ordinary low water along the southern shore of those islands together with the line marking the seaward limit of those waters. If those waters are inland waters, as the states contend, then they and everything that lies beneath them belong to the states. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).[1] If, on the other hand, the waters of Mississippi Sound are marginal and open sea, then the only claim to them and whatever underlies them which

1. In my opinion, the holding of the court in *U. S. v. California*, 332 U.S. 19, 91 L.Ed. 1889, 67 S.Ct. 1658 (1947) does not alter this rule, which was recognized and confirmed by Sec. 3 of the Submerged Lands Act (43 U.S.C. 1311) subsequent to that opinion.

the states have is pursuant to the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, Sec. 4 of which (43 U.S.C. 1312), fixes the seaward boundaries of a coastal state as "a line three geographical miles distant from its coastline,"[2] and Sec. 3 of which (43 U.S.C. 1311) releases to the states "all right, title and interest of the United States, if any it has," in "the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters". As some of the barrier islands lie more than six miles from the mainland shore, this would create a number of enclaves of open sea within Mississippi Sound belonging to the United States (see attached chart Exhibit A).

THE GENEVA CONVENTION

The Court has adopted the provisions of the Convention on the Territorial Sea and the Contiguous Zone (the Geneva Convention) as the proper basis upon which to determine the seaward boundaries of the various states. *U. S. v. California*, 381 U.S. 139, 165, 14 L.Ed.2d 296, 313, 85 S.Ct. 1401 (1965). The states have introduced a great deal of evidence as to how the waters of Mississippi Sound differ from those of the Gulf of Mexico lying south of the barrier islands and of their similarity to other waters admittedly inland, and as to the similarity of the northern coast of the barrier islands to the mainland shore and the differences between that coast and the southern coast of the

2. Subsequent to the original reference to the Special Master, the State of Mississippi filed with the Court a "Motion for Relief from Final Decree," which was also referred to the Special Master. 73 L.Ed.2d 1337. As all of the points raised by this motion were considered by the Court prior to entry of the decree, and as the United States concedes that the decree does not foreclose the claim that Mississippi Sound is inland waters (Memorandum of the United States in Opposition, p. 2), I recommend that this Motion be overruled.

islands; but under that holding, all of this appears completely immaterial. It is the Geneva Convention which must govern.

Article 3 of the Convention provides:

> Except where otherwise provided in these Articles, the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large-scale charts officially recognized by the coastal state.

Article 10 provides in part:

> 2. The territorial sea of an island is measured in accordance with the provisions of these Articles.

Applying these two Articles strictly, and construing them under Section 4 of the Submerged Lands Act (43 U.S.C. 1312), produces the effect for which the United States contends and creates the enclaves of high seas within Mississippi Sound as shown on the attached chart. The states contend that these enclaves, being completely surrounded by their territorial seas and therefore inaccessible to international usage, serve no purpose and should therefore be assimilated to those territorial seas. The United States, on the other hand, while conceding the lack of access, argues that in order to maintain its international position, it is necessary for it to insist upon these enclaves. Neither of these arguments appears to be pertinent. The question is governed solely by the provisions of the Covenant itself, which appear clear. It is significant to note that both the 1930 Hague Conference and the International Law Commission considered and rejected proposals for the assimilation of such enclaves.

If this were all there is to it, this would be a simple case indeed. But it is not. Article 3 recognizes certain

exceptions to the general rule, and the states insist that Mississippi Sound comes within one or more of these exceptions. Therefore, it is necessary to consider each of them separately.

STRAIGHT BASELINES

Article 4 of the Geneva Convention reads in part as follows:

> In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

The states insist that by its action (although not explicitly) the United States has in fact adopted such a system of straight baselines, which would include Mississippi Sound as internal waters.

I had occasion to deal with a similar coastline, that of the State of Louisiana, in an earlier report (July 31, 1974 at pp. 5-13) which was approved by the Court (420 U.S. 529, 43 L.Ed.2d 373, 95 S.Ct. 1180). I see no basis upon which to differentiate the situation of Mississippi and Alabama in regard to the matters there dealt with, and none for changing my views as there expressed.

The states, however, contend that the United States has traditionally claimed as inland waters sounds and straits lying behind islands where none of the entrances between islands or islands and the mainland exceeds ten miles in width, and that this amounts to the adoption of straight baselines. It is apparently true that prior to the ratification by the United States of the Geneva Convention

(March 24, 1961) it adhered to the so-called "ten mile rule"; but since that time, as the Court held in *United States v. California, supra*:

> Unquestionably the 24-mile closing line together with the semicircle test now represents the position of the United States. (381 U.S. at p. 164).

And the following language from the Court's opinion in that case appears to me to foreclose that argument completely:

> We agree with the United States that the Convention recognizes the validity of straight baselines used by other countries, Norway for instance, and would permit the United States to use such base lines if it chose, but that California may not use such baselines to extend our international boundaries beyond their traditional international limits *against the expressed opposition of the United States*. The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. *We conclude that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States.* (381 U.S. 167-168. Emphasis supplied). (See also 394 U.S. 11, 74, Note 97).

I therefore conclude that the United States has not in fact adopted the straight baseline method authorized by Article 4 of the Convention and, as the Court says in *United States v. Louisiana*, 394 U.S. 11, 22 L.Ed.2d 44, 89 S.Ct. 773 (1969):

> While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furtherest extent consonant with international law. (394 U.S. at pp. 72-73).

I am therefore convinced that the adoption of the 24-mile closing line together with the semi-circle test in place of the ten mile rule represents the present position of the United States and that this has resulted in no contraction of the recognized territory of the States of Alabama and Mississippi for reasons that will hereafter appear, and that therefore Article 4 of the Convention does not apply.

JURIDICAL BAYS

In *United States v. Louisiana, supra*, the Court says:

> We have concluded that Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland. Article 7 defines bays as indentations in the "coast," a term

> which is used in contrast with "islands" throughout the Convention. Moreover, it is apparent from the face and the history of the Convention that such insular formations were intended to be governed solely by the provision in Article 4 for straight baselines. (394 U.S. at pp. 67-68. Emphasis supplied).

From this it is apperent to me that while under the quoted language Article 4 is the exclusive means of dealing with islands which cannot realistically be considered part of the mainland, and that I am therefore foreclosed from finding that a bay formed in part by such islands is a juridical bay under Article 7, where a bay is formed in part by an island or islands which can realistically be considered part of the mainland it is governed by Article 7 of the Convention, including Section 3 thereof dealing with islands lying in the mouth of a bay. It is to consideration of that Article that I now turn.

The State of Mississippi has apparently abandoned its contention that the barrier islands lying off of its mainland shore are in fact extensions of that mainland and therefore properly assimilable thereto (See United States' Final Post-Argument Memorandum, p. 4), a contention which in my opinion is in any event untenable; however both it and the State of Alabama continue to insist that Dauphin Island, the only such island which lies off of the Alabama mainland shore, is such an extension and so assimilable.[3] In view of this, much of the evidence introduced as to the nature of the north shore of those islands and of the intervening waters between them and the mainland be-

---

3. Alabama also argues that if this is true and Mississippi sound as a whole is not a true bay, then a smaller juridical bay exists with a closing line from the western extremity of Dauphin Island to Point Aux Chenes. While this would appear to be true (see Stipulations 4 and 5) it is unnecessary for me to pass upon this point in view of my subsequent findings.

comes irrelevant. The sole questions are whether Mississippi Sound is a juridical bay under Article 7 of the Convention; or, if it is not, whether it qualifies as a so called "historic bay" under Article 7 (6) thereof. Putting aside the latter question for later consideration, I now turn to the requirements of Article 7 for a juridical bay.

The pertinent parts of that article read as follows:

> 2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.
>
> 4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

Thus, it appears that there are four requirements for a juridical bay: 1) It must be a well marked indenta-

tion; 2) its penetration must be in such proportion to the width of its mouth as to contain land locked waters and constitute more than a mere curvature of the coast; 3) it must have a closing line of twenty-four miles or less;[4] and 4) it must meet the semi-circle test. Each of these requirements will now be considered.

1.) Twenty-Four Mile Closing Line and Semi-Circle Test

In order to determine if Mississippi Sound meets the 24-mile closing line test, it is necessary first to locate its natural entrance points. For this purpose, I turn first to its western extremity.

On May 18, 1982 the United States filed its response to the State of Mississippi's First Request for Admissions. Request No. 19 and the response thereto read as follows:

"REQUEST NO. 19:

Please admit that the Isle of Pitre is a proper extension of the Louisiana mainland.

RESPONSE:

It is admitted that the Isle au Pitre might be treated as an extension of the Louisiana mainland pursuant to the 1969 *Louisiana* decision. It is denied that this treatment is relevant to the case at bar."

The reference in the first sentence of the response is apparently to the following language in *United States v. Louisiana*, *supra*, where the court says:

---

4. I do not find the provision of sub-section 3 for a fall back line applicable to this case, as in the absence of islands it would be clearly impossible to draw a straight baseline of twenty-four miles which would meet the other requirements of Article 7.

While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance—in the light of these and any other relevant criteria and any evidence he finds it helpful to consider—whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the "coast" within the meaning of the Convention on the Territorial Sea and the Contiguous Zone. (394 U.S. at p. 66).

Assuming the prerogative given in the above language and applying it to what appear to be the undisputed facts in the present case, I therefore hold that Isle au Pitre may be properly assimilated to and considered as an extension of the Louisiana mainland for all purposes here pertinent, and that therefore the western terminus of the closing line of Mississippi Sound is the easternmost promontory of that island.

The next question is how that line should be drawn eastward from that point, in view of the fact that Mississippi Sound, because of the presence of the barrier islands, has more than one mouth. The Court has apparently settled this issue in *United States v. Louisiana*, *supra*, where referring to the second sentence of Article 7, Section 3 of the Covenant (quoted above) it says:

> While the only stated relevance of such islands is to the semi-circle test, it is clear that the lines across the

various mouths are to be the baselines for all purposes. The application of this provision to the string of islands across the openings to the Lake Pelto-Terrebonne Bay-Timbalier Bay complex has raised the following questions: (a) between what points on the islands are the closing lines to be drawn, and (b) should the lines be drawn landward of a direct line between the entrance points on the mainland?

(a) It is Louisiana's primary contention that when islands appear in the mouth of a bay, the lines closing the bay and separating inland from territorial waters should be drawn between the mainland headlands and the seawardmost points on the islands. This position, however, is refuted by the language of Article 7(3), which provides for the drawing of baselines "across the different mouths" (emphasis supplied), not across the most seaward tips of the islands. There is no suggestion in the Convention that a mouth caused by islands is to be located in a manner any different from a mouth between points on the mainland—that is, by "a line joining the low-water marks of [the bay's] natural entrance points." (394 U.S. at pp. 55-56).

Here again the facts appear to be undisputed. It is stipulated that the total water distances of the entrances to Mississippi Sound between the eastern extremity of Isle au Pitre and the western extremity of Dauphin Island total 21.7641 miles (Stipulation No. 1), or less than 24 miles. There is therefore no question but that if Dauphin Island can realistically be considered a part of the mainland the 24-mile test is met. That therefore is the next matter which I will consider.

How does Dauphin Island differ from the other barrier islands which are apparently conceded not to be extensions of the mainland? In four respects only: 1) proximity to the mainland, 2) degree of habitation, 3) connection to the mainland by a bridge, and 4) location in the mouth of Mobile Bay. It therefore remains to examine which if any of these are relevant.

It is stipulated that the total water gap distance between the northern tip of Dauphin Island and Cedar Point on the mainland is no more than 1.60 nautical miles (Stipulation No. 7). While this is substantially less than the distance of any of the other barrier islands from the mainland, still it is considerably more than that of Isle au Pitre therefrom, and, I believe, more than was contemplated by the Court in the language quoted from *United States v. Louisiana, supra*. In the other respects referred to in that language, Dauphin Island differs little if any from the other barrier islands.

The degree of development of the island for human habitation and use seems to have no bearing upon the issue whatever. Many highly developed islands remain true islands and do not by being so developed become extensions of the mainland.

The States insist however that because Dauphin Island is connected to the mainland by a bridge its development is significant. The United States, on the other hand, takes the position that any such contention is precluded by the *Florida* case, 420 U.S. 531, 43 L.Ed.2d 375, 95 S.Ct. 1162 (1975); 425 U.S. 791, 48 L.Ed.2d 388, 96 S.Ct. 1840 (1976) denying the keys the status of mainland extension despite a bridge connection to the mainland and by *United States v. California*, 447 U.S. 1, 64 L.Ed.2d 681, 100 S.Ct. 1994 (1980). The latter view seems to me to be sound, and I therefore find that the mere fact that it is connected to the mainland by a bridge or other artificial structure does not standing alone make Dauphin Island a part of the mainland. However, this fact taken with others may be in-

dicative . See *United States v. Louisiana, supra* (394 U.S. at p. 72, Note 95, final sentence).[5]

The fourth and final distinction between Dauphin Island and the other barrier islands appears to be unique and significant. Dauphin Island is directly in the mouth of Mobile Bay, which is admittedly a juridical bay. Its closing line as established by the Baseline Committee extends westward from the western extremity of Mobile Point to the eastern extremity of Dauphin Island, thence along the eastern tip of Dauphin Island to Little Dauphin Island, thence along the northeast coast of Little Dauphin Island to North Point, thence to Cedar Point. (See Nautical Chart 11376,-Joint Exhibit 1). It appears to be agreed that all waters north of this line are inland waters. Thus Dauphin Island at least touches upon (and, if Little Dauphin Island is considered a part of it, is substantially coextensive with) inland waters of the state of Alabama. (See Figures 5 and 6, Post Trial Brief of the State of Alabama).

There seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland. If this is correct, then Dauphin Island, as it adjoins the mainland, is clearly an extension thereof; in effect, a peninsula extending westwardly therefrom and separating the Gulf of Mexico from Mississippi Sound. It meets the criteria recognized by the Court in *United States v. Louisiana, supra*:

> "Obviously, some islands must be treated as if they were part of the mainland. The size of the island,

5. The United States argues that because the bridge connecting Dauphin Island to the mainland was partially destroyed by hurricane Frederick, it is not a permanent structure, although it has since been replaced. I find this argument without merit. It was clearly intended as a permanent structure.

> however, cannot in itself serve as a criterion, as it must be considered in relationship to its shape, orientation and distance from the mainland." Boggs, Delimitation of Seaward Areas under National Jurisdiction, 45 Am J Int'l 240, 258 (1951).
>
> "Islands close to the shore may create some unique problems. They may be near, separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland." Pearcy, Geographical Aspects of the Law of the Sea, 49 Annals of Assn. of American Geographers No. 1, p. 1, at 9 (1959).
>
> The director of the Coast of Geodetic Survey, Department of Commerce, has stated the following rule for the assimilation of islands to the mainland:
>
> "The coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, *or they form an integral part of a land form.*" Memorandum of April 18, 1961, excerpted in 1 Shalowitz, supra, n. 7, at 161, n. 125. (Emphasis supplied).
>
> Shalowitz has recognized that "[w]ith regard to determining which islands are part of a land form and which are not, no precise standard is possible. Each case must be individually considered within the framework of the principal rule." Id., at 162. And see Strohl, supra, n 23, at 76, fig 18. (394 U.S. at p. 66, Note 85).

If my reasoning above is correct, and inland waters are to be considered part of the mainland, then Dauphin Island is "near, separated from the mainland by so little water

that for all practical purposes the coast of the island is identified as that of the mainland" and is "so situated that the waters between them (it) and the mainland are sufficiently enclosed to constitute inland waters." In fact, it would appear as a general rule derived from Article 7 Section 3 of the Geneva Convention and the Court's interpretation thereof in *United States v. Louisiana, supra*, (394 U.S. at p. 55) that where islands lie within the mouth of a bay they are to be considered as part of the mainland for all purposes.

It now remains to apply the tests outlined by the Court in *United States v. Louisiana, supra*, (394 U.S. at p. 66) to Dauphin Island in light of the above.

1.) *Size*: Dauphin Island is approximately 14.75 miles long and 1.58 miles wide at its widest point. It tapers to 1500 feet wide at its eastern end and to a mere 400 feet at its western end. However as noted above, size cannot itself serve as a criteria, as it must be considered in relationship to its shape, orientation and distance from the mainland.

2.) *Distance from the Mainland*: Dauphin Island in 1.60 nautical miles from Cedar Point (Stipulation No. 7); but it is immediately adjacent to the inland waters of Mobile Bay, which are a part of the mainland.

3.) *Depth and Utility of Intervening Waters*: There are no intervening waters between Dauphin Island and the inland waters of Mobile Bay. The depth of the waters between Dauphin Island and Cedar Point, exclusive of dredged channels, is no greater than six feet, and therefore cannot as a practical matter be utilized by international traffic.

4.) *Shape*: Dauphin Island is long and narrow, extending from east to west. It appears from its shape and

orientation to be an elongation of Mobile Point; and, in fact, the two appear to have been connected in the Holocene era.

5.) *Relationship to Configuration or Curvature of the Coast*: Generally the configuration of Dauphin Island follows the curvature of the shoreline, with the exception of the projection of Cedar Point.

As indicated above, the geological history of Dauphin Island shows that it was in fact once part of the mainland. In the Pleistocene era some 120,000 years ago barrier ridges formed along the Mississippi coast. Later, in the Holocene era around 18,000 years ago, the sea level was very low. It was so low that Fort Morgan Peninsula was connected to Dauphin Island (or put another way, the mouth of Mobile Bay was above water). The sea level rose sporadically until, about 9,000 years ago, it was only 8 meters below the present sea level. Over the next 5,000 years the Mississippi Sound basin was gradually submerged. By about 4,000 years ago only eastern Dauphin Island was left above water. Due to the interaction of tidal forces and the littoral drift, this eastern part of Dauphin served as a core area from which a sand spit started to grow in a westerly direction. The rest of the islands formed subsequently by a process of aggradation, as the westernly littoral drift carried sediment from the Florida Panhandle, the Alabama mainland, and to a lesser extent, the open sea. As the Court noted in *Louisiana v. Mississippi*, 202 U.S. 1, 50 L.Ed. 913 (1906):

> Islands formed by alluvion were held by Lord Stowell, in respect of certain mud islands at the mouth of the Mississippi, to be "natural appendages of the coast on which they border, and from which, indeed, they are formed." The Anna (1805) 5 C. Rob. 373. (202 U.S. at pp. 52-53).

I am therefore constrained to find that Dauphin Island constitutes an extension of the mainland. In doing so, I am fully aware of the Court's language in *United States v. Louisiana*, *supra*, which I previously interpreted as precluding such a holding in the case of the islands in the Caillou Bay area. However I believe that the factual situation here differs materially, basically because Dauphin Island lies in the mouth of Mobile Bay which is indisputably inland waters.[6]

If I am correct in this finding, and in that regarding Isle au Pitre, then admittedly Mississippi Sound meets the 24 mile test (Stipulation No. 1)[7] and also the semi-circle test (Stipulation No. 9).

2.) Well Marked Indentation Containing Land Locked Waters

Apparently a "well marked indentation" is one which has clearly distinguishable "natural entrance points",

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6. Here it should perhaps be noted that the Special Master in *United States v. Maine* rejected the government's contention that "only small marshy deltaic islands can be considered part of the mainland and coastal islands cannot be assimilated as part of the mainland and cannot be used to join juridical bays" and therefore found that Long Island is an extension of the mainland, relying in part upon my earlier report in this case (See *U.S. v. Maine*, (No. 35) Original) Report of the Special Master, p. 32, Note 22 Filed January 13, 1984).

7. The states contend that even if Dauphin Island is not considered a part of the mainland, then the eastern natural entrance point of Mississippi Sound is Cedar Point, and therefore the total closing line distance is still less than 24 nautical miles (Stipulations Nos. 1 and 7). The United States contends that the eastern natural entrance point to Mississippi Sound is Mobile Point, and that therefore the length of that closing line exceeds 24 nautical miles (Stipulations Nos. 1 and 7). In view of my finding as to Dauphin Island, it is unnecessary for me to pass upon these contentions. Suffice to say that in my judgment, Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and Cedar Point. See *United States v. Louisiana*, *supra*, 394 U.S. at p. 62, Note 83.

within which the waters lie *inter fauces terrei*. But as the Court clearly said in *United States v. Louisiana*, 394 U.S. 11, 22 L.Ed.2d 44, 89 S.Ct. 773 (1969):

> "No language in Article 7 or elsewhere positively excludes all islands from the meaning of 'natural entrance points' to a bay" (394 U.S. at p. 61).

Neither the Geneva Convention nor the Court's decisions afford much assistance in determining what are clearly distinguishable "natural entrance points." The matter seems to be largely subjective and to rest with the adjudicating authority. The parties however have stipulated that the scale map which was introduced as Joint Exhibit 45-3 "is a true and accurate representation of the present geographic features and relationship depicted thereon" (Stipulation No. 3). Based upon this, I find that if Isle au Pitre and Dauphin Islands are accepted as its headlands, Mississippi Sound is a well marked indentation in the coast.

It then remains to determine if its "penetration is in such proportion to the width of its mouth as to contain land locked waters and constitute more than a mere curvature of the coast." The states contend that when a body of water meets the semicircle test (as Mississippi Sound admittedly does; see Stipulation No. 9) then this requirement is fulfilled. I disagree. The Court appears to have settled this point in *United States v. Louisiana*, *supra*, where it says:

> We cannot accept Louisiana's argument that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention. Such a construction would fly in the face of Article 7(2), which plainly treats the semicircle test as a minimum requirement. And we have found nothing in the history of the Convention which would support so awkward a construction. (394 U.S. at p. 54).

The problem is even more complex where there are islands in the mouth of the putative bay. Again there appears to be little applicable authority. Of some assistance, however, is the following quotation from the Commentary of the International Law Commission (2 Y.B. Int.L. Comm'n p. 296 (1956)) approved by the Court in *United States v. Louisiana*, *supra*:

> Here, the Commission's intention was to indicate that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify some alteration in the ratio between the width and the penetration of the indentation. (394 U.S. at p. 56).

Therefore I must once more rely upon largely subjective criteria. Mississippi Sound has multiple mouths, the total water distances of which based upon the findings which I have heretofore made total slightly less than 24 nautical miles. Referring again to Joint Exhibit 45-3, the greatest distance from the north shore of any of the barrier islands to the mainland is approximately 10 nautical miles. The relation of maximum penetration to width of mouth is therefore .4167:1, which in my opinion is enough to constitute more than a mere curvature of the coast, and I so find.

It is of interest to note that the United States in its Reply Brief in *U.S. v. Louisiana*, *supra*, (1969) (contrary to the position which it now takes) reached the same conclusion in its attempt to distinguish Louisiana's claims. There it states:

> "Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation—an

> entirely different matter. Mississippi Sound, referred to by Louisiana is such a situation." (Exhibit J-66, p. 30).

The sole remaining question is whether the waters of Mississippi Sound are so enclosed as to be considered land locked. In this connection the following language from Hodgson and Alexander, "*Towards an Objective Analysis of Special Circumstances*", Occasional Paper No. 13, Law of the Sea Institute, Univ. of Rhode Island, 1972 (p. 20) appears to be particularly pertinent:

> "If a line or group of islands relate to the mouth of a bay so as to exceed in length more than 50% of the length of the bay closing line, the islands screen the mouth of the bay and form the natural limit for land-locked waters."

The straight line distance from Isle au Pitre to Dauphin Island is approximately 45 nautical miles (Exh. J 45-3, Stipulation No. 3). The water gap distance between the islands located between those two parts is 21.7641 nautical miles (Stipulation No. 1). It is therefore apparent that the islands occupy more than half the distance.

The excerpt from the Memorandum of April 18, 1961 from the Director, Coast and Geodetic Survey, Department of Commerce approved by the Court in another context and quoted above (394 U.S. at p. 66, Note 85) also appears to have some bearing upon this issue, stating at least by inference that where islands form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, the coast line should embrace those islands. The barrier islands do form such a portico, and the waters behind them are completely enclosed either by land or

adjoining inland waters except for six mouths,[8] none of which is more than 6 nautical miles in width (Exhibit 45-3, Stipulation No. 3).

In the light of these authorities I am constrained to find that the waters of Mississippi Sound are by their nature land-locked.

HISTORIC BAYS

In 1961 the United States ratified the Geneva Convention. As noted earlier, that action for the first time precisely defined inland waters. See *United States v. California*, *supra*. But that definition, while precise in some respects, recognizes certain exceptions. Article 7 Section 6 reads in part:

> "The foregoing provisions shall not apply to so-called 'historic' bays."

It is with this exception that I shall now undertake to deal.

The first reference to historic bays in the reported decisions of the Court is apparently in *United States v. California*, *supra*, where it is said:

> Historic Inland Waters.—By the terms of the Convention the 24-mile closing rule does not apply to so-called "historic" bays. Essentially these are bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations. (381 U.S. at p. 172).

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8. There are references to seven mouths in the record; but if I am correct in my finding that Dauphin Island is an extension of the mainland, there are only six. See *United States v. Louisiana*, *supra*, 394 U.S. at p. 62, Note 63.

Later the Court says:

> The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive. (381 U.S. at p. 175).

Subsequently the Court considered the matter at greater length in *United States v. Louisiana*, *supra*, saying:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations.
>
> Outside the territorial sea are the high seas, which are international waters and are not subject to the dominion of any single nation.
>
> Whether particular waters are inland has depended on historical as well as geographical factors. Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are neces-

narily inland. But it has also been recognized that other areas of water closely connected to the shore, although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation. As we said in United States v. California, it is generally agreed that historic title can be claimed only when the "coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." 381 U.S. at p. 172, 14 L.Ed.2d at 317. (394 U.S. at pp. 22-23).

To this the Court appends the following note:

A recent United Nations study recommended by the International Law Commission reached the following conclusions: "There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient." Juridical Regime of Historic Waters, Including Historic Bays, [1962] 2 YB Int'l L Comm'n 1, 13, UN Doc A/CN.4/143

(1962). See also Bouchez, supra, n. 23, at 203, 221. (394 U.S. at p. 23, Note 27).

Later in the same opinion the Court says:

Historic bays are not defined in the Convention, and the term therefore derives its content from general principles of international law. As the absence of a definition indicates, there is no universal accord on the exact meaning of historic waters. There is substantial agreement however, on the outlines of a doctrine and on the type of showing which a coastal nation must make in order to establish a claim to historic inland waters. But because the concept of historic waters is still relatively imprecise and its application to particular areas raises primarily factual questions, we leave to the Special Master—as we did in United States v. California—the task of determining in the first instance whether any of the waters off the Louisiana coast are historic bays. (394 U.S. at pp. 74-75).

Again the Court appends a significant note:

The United States argues that the Convention recognizes only historic bays and not other kinds of inland water bodies. We do not pass on this contention except to note that, by the terms of the Convention, historic bays need not conform to the normal geographic tests and therefore need not be true bays. How unlike a true bay a body of water can be and still qualify as a historic bay we need not decide, for all of the areas of the Mississippi River Delta which Louisiana claims to be historic inland waters are indentations sufficiently resembling bays that they would clearly qualify under Article 7(6) if historic title can be proved. (394 U.S. at p. 75, Note 100).

From this it is apparent that a body of water may to some extent be unlike a true bay and still qualify as a historic bay.

In an earlier report, I found that there were no non-juridical bays on the Louisiana coast which would so qualify and this finding was approved by the Court (420 U.S. 529). I believe however that Mississippi Sound presents quite a different factual situation and, although such will be unnecessary if the Court approves my findings that Mississippi Sound is a juridical bay, I now proceed to a consideration of those facts.

In *United States v. Alaska*, 422 U.S. 184, 45 L.Ed.2d 109, 95 S.Ct. 2240 (1975) the Court summarized the holdings of the two cases quoted above as follows:

The term "historic bay" is not defined in the Convention. The Court, however, has stated that in order to establish that a body of water is a historic bay, a coastal nation must have "traditionally asserted and maintained dominion with the acquiescence of foreign nations." United States v. California, 381 US, at 172, 14 L Ed 2d 296, 85 S Ct 1401. Furthermore, the Court appears to have accepted the general view that at least three factors are significant in the determination of historic bay status: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; and (3) foreign states must have acquiesced in the exercise of authority. Louisiana Boundary Case, 394 US, at 75, 22 L Ed 2d 44, 89 S Ct 773 and 23-24, n 27, 22 L Ed 2d 44, 89 S Ct 773. (422 U.S. at p. 189).

To this language the Court adds the following note:

Some disagreement exists as to whether there must be formal acquiescence on the part of foreign

states, or whether the mere absence of opposition is sufficient. United States v. Louisiana (Louisiana Boundary Case) 394 US 11, 23-24, n. 27, 22 L Ed 2d 44, 89 S Ct 773 (1969). (422 U.S. at p. 189, Note 8).

Subsequently in that same opinion the Court says:

Even if we could agree that the boundaries selected for purposes of enforcing fish and wildlife regulations coincided with an intended assertion of territorial sovereignty over Cook Inlet as inland waters, we still would disagree with the District Court's conclusion that historic title was established in the territorial period. The court found that the third essential element of historic title, acquiescence by foreign nations, was satisfied by the failure of any foreign nation to protest. Scholarly comment is divided over whether the mere absence of opposition suffices to establish title. See Juridical Regime of Historic Waters, Including Historic Bays, 2 Yearbook of the International Law Commission, 1962 pp. 1, 16-19 (UN Doc A/CN.4/143). The court previously has noted this division but has taken no position in the debate. See Louisiana Boundary Case, 394 US, at 23-24, n. 27, 22 L.Ed.2d 44, 89 S.Ct. 773. In this case, we feel that something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless *unless it is shown that the governments of those countries knew or reasonably should have known of the authority being asserted. Many assertions of authority are such clear expressions of exclusive sovereignty that they cannot be mistaken by other governments.* Other assertions of authority, however, may not be so clear. One scholar notes: "Thus, the placing of lights or beacons may sometimes appear to be an act of sovereignty, while in other circumstances

it may have no such significance." Juridical Regime of Historic Waters, supra, at 14. We believe that the routine enforcement of domestic game and fish regulations in Cook Inlet in the territorial period failed to inform foreign governments of any awareness on the part of foreign governments of a claimed territorial sovereignty over lower Cook Inlet, the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title. (422 U.S. at pp. 199-200 Emphasis supplied).

It remains to apply these principles to the historical facts of the present case.

1.) Pre-Admission History

This portion of the history of the area here involved is set forth at some length in *Foster and Elam v. Neilson*, 27 U.S. (2 Peters) 253, 300-309, 7 L.Ed. 415 (1829); in *Louisiana v. Mississippi*, 202 U.S. 1, 36-45, 50 L.Ed. 913, 925, 929 (1905); and in *United States v. Louisiana*, 363 U.S. 1, 71-75, 4 L.Ed.2d 1025, 1068-1071, 80 S.Ct. 96 (1960). It is therefore unnecessary to reiterate it here. Suffice to say that during the period from 1756 to 1819 what is now Mississippi Sound was apparently considered by whatever nation possessed the surrounding mainland and islands as part of its possession. After the acquisition of the territory by the United States by virtue of the Louisiana Purchase on April 30, 1803 Congress formally authorized the President to take possession thereof (2 Stat. 245) and subsequently (February 24, 1804) passed an Act for laying and collecting duties therein (2 Stat. 251) including "all navigable waters, rivers, creeks, bays, and inlets lying within the United States, which empty into the Gulf of Mexico, east of the River Mississippi." Spain disputed the authority of the United States in the eastern part of the area,

but on February 2, 1819 acquiesced therein by signing a Treaty of Amity with the United States.

2.) Acts of Admission

Both Mississippi's Enabling Act of March 1, 1817 (3 Stat. 348) and that of Alabama of March 2, 1818 (3 Stat. 489-490) define their boundaries as extending to the Gulf of Mexico; thence, eastwardly (or, in the case of Mississippi, westwardly), "including all islands within six miles of the shore" to its termination. The two states assert that this language establishes their southern boundaries along the southern coast of the barrier islands.

Construing the language in the Mississippi Act in *Louisiana v. Mississippi*, *supra*, the Court says:

> It seems obvious to us that it was to this chain of islands that Congress referred when it admitted Mississippi into the Union. (202 U.S. at p. 47).

This conclusion appears inescapable. There are no other islands within six miles of the southern mainland of either Mississippi or Alabama.

This still does not however resolve the question of whether the waters lying between these islands and the mainland are inland waters. The Court in *Louisiana v. Mississippi*, *supra*, thought that they were, saying:

> Mississippi's mainland borders on Mississippi sound. *This is an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat island.* The openings from this body of water into the Gulf are neither of them 6 miles wide. Such openings occur between Cat island and Isle a Pitre; between Cat and Ship islands; between Ship and Horn

islands; between Horn and Petit Bois islands; between Petit Bois and Dauphin islands; between Dauphin island and the mainland on the west coast of Mobile Bay. The maps show all this, and among others, reference may be made to Jeffrey's map of 1775, given in the record, and which, in reduced form, is reproduced from Jeffrey's Atlas of 1800 as the frontispiece of vol. 2, Adam's History of the United States.

(202 U.S. at p. 48 Emphasis supplied).

At first glance this would appear to settle the matter; but the United States insists 1.) that the quoted statement is mere dicta and not a holding of the Court, 2.) that the United States is not bound thereby as it was not a party to the litigation, and 3.) that in any event the Court did not hold Mississippi Sound to be inland waters.

With the first of these propositions I cannot agree. The question before the Court was whether the rule of the thalweg applied in determining the boundary between the states of Louisiana and Mississippi in Mississippi Sound. In reaching its conclusion that that rule did apply, the Court said:

> If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep-water channel. (202 U.S. at p. 49).

But counsel contend that the rule "as to the flow of the midchannel or thalweg of the River Iberville (now known as Manchac) through the east, through Lakes Maurepas and Pontchartrain, expires by its own limitation when such midchannel reaches Lake Borgne, which, in contemplation of the rule, is the open sea, and part of the waters of the Gulf of Mexico." This contention is inconsistent, as matter of fact, with

the allegation of the cross bill that "the Mississippi sound was recognized as a body of water 6 leagues wide, wholly within the state of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from the Gulf of Mexico," and with Mississippi's Exhibit Map A, presenting her claim, while the record shows that the strip of water, part of Lake Borgne and Mississippi sound, is not an open sea, but a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth. (202 U.S. at pp. 51-52).

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary. (202 U.S. at p. 53).

In view of the above, a holding that "the strip of water, part of Lake Borgne and Mississippi Sound, is not open sea, but a very shallow arm of the sea" seems to me essential to the Court's holding that the rule of the thalweg applies in determining the boundary between the states.

I do, however, find more merit in the second contention of the United States. In *United States v. California*, *supra*, the Court cites three cases dealing with the *Pollard* doctrine, among them *Louisiana v. Mississippi*, *supra*. Commenting upon that decision, the Court says:

> The second case, *Louisiana v. Mississippi*, 202 US 1, 52, 50 L.ed 913, 931, 26 S. Ct. 408, 571, uses language about "the sway of the riparian states" over "maritime belts." That was a case involving the boundary between Louisiana and Mississippi. It did not involve any dispute between the federal and state governments. (332 U.S. at p. 37).

The Court then goes on to say:

> None of the foregoing cases, nor others which we have decided, are sufficient to require us to extend the Pollard inland water rule so as to declare that California owns or has paramount rights in or power over the three-mile belt under the ocean. (332 U.S. at p. 38).

As to the third proposition, I do not believe that the decision of the Court in *Louisiana* v. *Mississippi*, *supra*, requires me to find that the waters of Mississippi Sound are inland waters. I do however believe that it indicates the reasoning of the Court as of that date (1906), and is therefore pertinent to the issue of whether Mississippi Sound has been historically regarded as inland waters.

Fifty-three years later this reasoning was still apparently accepted by the United States, for in its brief in *United States* v. *Louisiana, et al.*, No. 11 Original, filed May 15, 1958, it says:

> "We need not consider whether the language, 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana* v. *Mississippi*, 202 U.S. 1, 48. The bed of these inland waters passed to the State on its entry into the Union. *Pollard's Lessee* v. *Hagan*, 3 How. 212." (p. 254).

Conceding *arguendo* that the United States is bound neither by the holding in *Louisiana* v. *Mississippi*, *supra*, (to which it was not a party and which involved no federal question) or by the concession based upon it, still

it appears from them that for more than half a century it was accepted by the United States that under the Mississippi Act of Admission (and the Alabama Act is similar) Mississippi Sound was inland waters.

Two years later the Court in *United States* v. *Louisiana*, *supra*, construing the Louisiana Act of Admission, which contains language similar to the Mississippi and Alabama Acts, said:

> And while "all islands" within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act evidently contemplated no territorial sea whatever. (363 U.S. at pp. 67-68).

Accordingly the Court holds:

> We have already held with respect to Louisiana's claim to a three league maritime boundary that an Act of Admission which refers to all islands within a certain distance of the shore does not appear on its face to mean to establish a boundary line that distance from the shore, including all waters and submerged lands as well as all islands. There is nothing in Mississippi's history, just as there is nothing in Louisiana's, to cause us to depart from that conclusion in this instance. (363 U.S. at p. 81).

A similar holding as to Alabama follows (363 U.S. at p. 82).

I take these holdings to foreclose me from finding that the Acts of Admission of Mississippi and Alabama on their face establish the southern boundaries of those

states as the southern coast of the barrier islands.[9] However, they do not prevent a factual finding that Mississippi Sound is inland waters and that therefore their southern boundaries are so located. In a note to its opinion the Court says:

> The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagan*, (US) 3 How. 212, 11 L.Ed. 565. Furthermore, since the islands enclose inland waters, a line drawn around those islands and the intervening waters would constitute the "coast" of Louisiana within the definition of the Submerged Lands Act. Since that Act confirms to all States rights in submerged lands three miles from their coasts, the Government concedes that Louisiana would be entitled not only to the inland waters enclosed by the islands, but to an additional three miles beyond those islands as well. *We do not intend, however, in passing on these motions, to settle the location*

9. Likewise I believe that this holding forecloses any application of Sec. 4 of the Submerged Lands Act (43 U.S.C. 1311) the final sentence of which reads:

> Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

The language of the constitutions of Alabama and Mississippi tracks that of their enabling acts.

> *of the coastline of Louisiana or that of any other State.* (363 U.S. at p. 68, Note 108. Emphasis supplied).

By subsequent reference the Court applies this language to Mississippi and Alabama as well (Notes 135, 139).

I take it, therefore, that if the fact is that the barrier islands are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters and have been historically so treated and recognized, then those waters and all beneath them belong to the states. It is to make a recommendation concerning that factual determination that this matter has been referred to me as Special Master.

3.) Post-Admission History

Mississippi Sound in general is not suitable for use by ocean going vessels, as it is quite shallow, ranging in depth from 1 to 18 feet, except for artificially maintained channels between Cat Island and Ship Island leading to Gulfport and between Horn Island and Petit Bois Island leading to Pascagoula. (Exhibit 1). Furthermore, it is a cul de sac, and there would be no reason for an ocean going vessel to enter the Sound except to reach these ports. In this it is similar to Chandeleur and Breton Sounds. The language of the United States in regard to these sounds in its brief in *United States v. California*, *supra*, is equally applicable to it:

> "Moreover, even if international traffic wanted for some inexplicable reason, to go through the maneuver of making a loop into the sounds at one end and back out again at the other, it could not do so because there is not sufficient depth. Not only is it not a 'useful' route for international traffic, it is not even a feasible one." (Brief of U.S. in Answer to California's Exceptions to the Report of the Special Master, pp. 153-155).

Commenting upon this, the Court said:

> By way of analogy California directs our attention to the Breton and Chandeleur Sounds off Louisiana which the United States claims as inland waters, United States v. Louisiana, 363 US 1 66-67, note 108, 4 L ed 1025, 1066, 80 S Ct 961. Each of these analogies only serves to point up the validity of the United States' argument that the Santa Barbara Channel should not be treated as a bay. The Breton Sound is a cul de sac. The Chandeleur Sound, if considered separately from the Breton Sound which it joins, leads only to the Breton Sound. Neither is used as a route of passage between two areas of open sea. In fact both are so shallow as to not be readily navigable. (381 U.S. at p. 171).

The situation of Mississippi Sound is identical.

The chief navigational utility of Mississippi Sound is intracoastal. Congress recognized this as early as February 8, 1817 (the year of Mississippi's enabling act) when a Committee of the House of Representatives listed among objects of national importance "a canal communication, if practicable, from the Altamaha and its waters to Mobile, and from thence to the Mississippi." (U.S. House of Representatives Document No. 427, 14th Congress, 2d Session, 1817). This ultimately reached its culmination in the Intracoastal Waterway.

The Committee on Military Affairs of the U.S. House of Representatives in its Report of February 28, 1822, recognized the importance of the intracoastal communication between New Orleans and Mobile Bay through what it described as:

> "The little interior sea, comprised between the mainland and a chain of islands bounded by Cat Island to the west and Dauphin Island to the east." (U.S. House of Reps., Rep. No. 51, 11th Congress, First Session, 1822).

On May 26, 1840 the Senate Committee on Military Affairs prepared a plan for the defense of U. S. Commerce which was printed for use by the Senate. This report suggested that a ship be stationed at Dauphin Island for the following purpose:

> "His duty should be to protect the extensive coasting trade between New Orleans, Mobile, &c. to watch and guard Mobile Bay, and its tributary streams—and in fact the line of coast from Mobile Bay to Lake Borgne." U.S. Senate Report No. 490, 26th Congress, First Session (1840).

A second report by the same Committee printed for use by the Senate on July 21, 1840 discussed ways to defend the passes between the islands into Mississippi Sound. It said:

> "The defenses indicated would cover one of the channels leading from the gulf into the broad interior water communication extending from Lake Borgne to the bay of Mobile . . ." (U.S. Senate Report No. 618, 26th Cong., First Session 1840).

Some ten years later the same Committee described the area as:

> "The broad sheet of water which lies between the coast of Mississippi and the chain of islands parallel to it, is the channel of a commerce important in peace and indispensable in war. Through this passes the inland navigation which connects New Orleans and Mobile." (U.S. Senate Committee Report No. 23, 31st Congress, First Session, 1850).

A significant event in the history of Mississippi Sound was the fortification of the western end of Ship Island. As early as 1847 the island was reserved for military purposes; in 1858 the War Department, carrying out an act of Congress of 1857, authorized the building of a fort to protect the shortcut to New Orleans, Rigolets Pass, the outlet of Lake Ponchartrain. In December 1860 work was still under way, and the Government had ordered 48 large cannon shipped from Pittsburgh. The outbreak of the war in 1861 left the Union garrison isolated on the island, and in May 1861 they destroyed the fort in order to prevent it falling into Confederate hands. For three months, from July to September 1861, five companies of Confederates held the fort, having rearmed it with eight small cannons after its "destruction." Because of the constant threat of the Federal fleet then blockading the mouth of the Mississippi, the Confederates fired the fort and evacuated the island on September 16. In December Gen. Benjamin Butler moved into the damaged fort with a garrison of about 7,000 Federal soldiers, at which time it was named Fort Massachusetts, in honor of Butler's home state, and partly rebuilt. In 1875 it was abandoned. See Caraway, "the Story of Ship Island," the Journal of Mississippi History, Vol. IV, p. 76 (1942). There could hardly be a clearer indication that the United States claimed the waters north of that island as its own, and was prepared to repel any belligerent attempt to enter them, although it was never called upon to do so; and any foreign nation which was in the least attentive must have been aware of that fact.

In more recent times, but still before the turn of the century, Mississippi Sound has been continuously recognized as an important inland water route, landlocked and separate from the Gulf. In 1880 it was described in U. S. House of Representatives Executive Document No. 58 as:

> "In many respects Mississippi Sound is one of the most important bodies of water on the Gulf coast of the United States. Secure from the heavy seas of the Gulf of Mexico . . . ."

U. S. House of Representative Executive Document No. 184 described the area in 1874 as:

> "These islands cover all the navigable passes from the Gulf of Mexico into Mississippi Sound." (U.S. House of Representatives Executive Document No. 184, 43rd Congress, First Session, 1874).

And as a final congressional example, the U.S. House of Representatives Commerce Committee reported:

> "The waters between the station [Ship Island] and the mainland being land-locked are most of the time smooth and easily traversed by row and sail boats." (U.S. House of Representatives Report Ap. 3998, 49th Congress, Second Session, 1887).

As previously noted, in 1906 the U.S. Supreme Court described Mississippi Sound as "an enclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama to Cat Island." *Louisiana v. Mississippi*, supra, 202 U.S. at p. 48.

In *United States v. California*, supra, the Court, commenting upon the report of the Special Master, filed before the ratification of the Geneva Convention by the United States, said:

> The Special Master found that there was no internationally accepted definition for inland waters decided, in those circumstances, that it was the position which the United States took on the question in the conduct of its foreign affairs which should be con-

trolling. He considered the relevant date on which to determine our foreign policy position to be the date of the California decree, October 27, 1947. He therefore rejected the assertion that letters from the State Department written in 1951 and 1952 declaring the then present policy of the United States were conclusive on the question before him. At the same time that decision required the Special Master to consider a great many foreign policy materials dating back to 1793 in an attempt to discern a consistent thread of United States policy on the definition of inland waters. He ultimately decided that as of 1947 the United States had taken the position that a bay was inland water only if a closing line could be drawn across its mouth less than 10 miles long enclosing a sufficient water area to satisfy the Boggs formula. (381 U.S. at 163).[10]

For purposes of applying the ten mile rule, where islands lie in the mouth of a bay thus creating multiple mouths, each mouth is to be considered separately. As one commentator puts it:

---

10. In an earlier note to the same opinion the Court defines the Boggs formula as follows:

> To determine whether a coastal indentation is of sufficient depth and shape to be inland water, the Boggs formula would (1) draw the closing line across the mouth of the indentation; (2) draw a belt around the shore of the indentation (similar to a small marginal belt) having a width equal to one-fourth the length of the closing line across the entrance; (3) compare the remaining area inside the closing line with the area of a semicircle having a diameter equal to one-half of the length of the closing line, and if the enclosed area is larger than that of the semicircle, the indentation is inland water. Boggs, Delimitation of the Territorial Sea, 24 Am J Int'l L 541, 548. (381 U.S. at p. 164, Note 5).

This appears however to be immaterial in the present case for Mississippi Sound clearly meets this test. Stipulation No. 9. Any bay which meets the requirements of the semicircle test under Article 7 of the Geneva Convention obviously meets those of the Boggs formula.

"A solution for the problem of setting outer limits for the United States was obtained by special adoptions pertaining to employments and islands, of the excellent principles established by S.W. Boggs, Geographer of the Department of State, in delimiting the territorial waters of the United States. These adoptions of Boggs' principles resulted in the following rules for delimiting coastal and Great Lakes water, and thereby, in part, for setting the outer water limits of the United States: (1) where the coast line is regular it shall be followed directly unless there are off-shore islands within ten nautical miles; (2) where embayments occur having headlands of less than ten and more than one nautical mile in width, a straight line connecting the headlands shall set the limits; (3) the coast line shall be followed if the indentation of the embayment is so shallow that its area is less than the area of a semi-circle drawn using the straight line as a diameter; and (4) two or more islands less than ten and more than one nautical mile from shore shall be connected by a straight line or lines, and other straight lines shall be drawn to the shore from the nearest point on each island." (Proudfoot, Measurement of Geographic Area, 1940).

The United States followed this principle in drawing the Chapman line:

> "When the Chapman line was drawn along the Louisiana coast (see Part I, 731), pursuant to the decision in *United States v. Louisiana*, 339 U.S. 699 (1950), the principle followed in drawing the baseline was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters." (Shalowitz, Shore and Sea Boundaries, Vol. 1, p. 161).

In regard to the Chapman line, the same writer says:

"The Chapman line was intended to represent graphically the ordinary low-water mark and the seaward limits of inland waters along the Louisiana coast. Its description and plotting on the charts represented an effort to apply, as accurately as possible, the principles of delimitation advocated by the United States in the proceedings before the Special Master." (Shalowitz, op.cit., Vol. 1, p. 108).

And in a footnote to the above:

"*These principles had been developed in international law or had been promulgated by the United States in its international relations.* They involved the semicircular rule (see 421) and the 10-mile rule (see 43) for bays, and the rule for straits leading to inland waters. *The latter situation did not arise in the California case.* Along the Louisiana coast all islands are so situated in relation to the mainland and to each other as to enclose all waters landward of the islands as inland waters with the result that the islands constitute large segments of the coastline. Mahler v. Norwich and New York Transportation Company, 35 N.Y. 352 (1866). Also see Brief for the United States in Support of Motion for Judgment on Amended Complaint 177, United States v. Louisiana et al., Sup. Ct. No. 11, Original, Oct. Term, 1957. The openings between the numerous islands along the Louisiana coast constitute channels leading to inland waters and the rule as to bays becomes applicable." (Shalowitz, op.cit., p. 108, Note 7 Emphasis supplied).

The Chapman line does not extend eastward beyond the Louisiana border. However in a letter to Governor Wright of Mississippi in 1951 Oscar L. Chapman, then

Secretary of the Interior, after whom the line is named, indicated that if so extended it would be as follows:

"Beginning at a point on the boundary between the State of Louisiana and the State of Mississippi, near latitude 30°09'00", longitude 8°56'40", where said boundary intersects a straight line drawn in a northwesterly direction from the ordinary low water mark at the northern most point of the most northerly island in the Chandeleur group and extending therefrom along said straight line to the ordinary low water mark at the westernmost extremity of the westernmost island of the Ship Island group of islands;

"Thence, in an easterly direction and northeasterly direction along ordinary low water mark on the Gulf side of three islands comprising the Ship Island group to the ordinary low water mark at the easternmost extremity of the easternmost of such islands, said extremity being referred to as East Point, except where such low water mark is interrupted by the opening between said islands, at such places the boundary line is a straight line across such openings;

"Thence, by a straight line in an easterly direction to the ordinary low water mark at the westernmost extremity of Horn Island;

"Thence, in an easterly direction along the low water mark on the Gulf side of Horn Island and continuing in an easterly direction along said low water mark to the easternmost extremity of an unnamed island immediately east of Horn Island near latitude 33°13'24", longitude 38°31'48";

"Thence, by straight line in a southeasterly direction across horn Island Pass to the ordinary low water mark at the northeasternmost extremity of Petit Bois Island;

"Thence, in an easterly direction along the ordinary low water mark on the Gulf side of Petit Bois Island to the intersection of said low water mark with the boundary between the State of Mississippi and the State of Alabama near latitude 30°12'12", longitude 38°23'12"."

The United States however now disclaims Mississippi Sound as historic inland waters. I must therefore consider the effect of that disclaimer.

In the *California* case, *supra*, the Court held:

> The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive. (381 U.S. at p. 175).

This seems to indicate that a higher than ordinary degree of proof is required to establish historic inland waters; but this appears to be refuted by the following language from earlier in the opinion:

> In particular it is said that the Special Master erroneously thought the concept of historic waters to be an exception to the general rule of inland waters requiring a rigorous standard of proof. We find no substantial indication of this in his report. (381 U.S. at pp. 173-174).

The Court in the *California* case attached much significance to the disclaimer by the United States. Referring to this, the Court in *United States v. Louisiana*, *supra*,

holds that any claim to historic title is barred by "long-standing, extrajudicial disclaimers of historic title." (394 U.S. at p. 29). Further construing its opinion in *United States v. California*, *supra*, the Court says:

> In *United States v. California* we noted, but found it unnecessary to pass on, the United States' contention that historic title cannot be founded upon exercises of state authority because a claim to historic inland waters can be maintained only if endorsed by the United States. We there sustained the Master's determination that, even assuming the relevance of California's assertions of sovereignty over the coastal waters, they did not establish historic title. The United States' disclaimer was credited only because the case presented such "questionable evidence of continuous and exclusive assertions of dominion." 381 U.S., at 175, 14 L. Ed.2d at 318. And we noted that we were "reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt." Ibid. Thus, the Court indicated its unwillingness to give the United States the same complete discretion to block a claim of historic inland waters as it possesses to decline to draw straight baselines.
>
> While we do not now decide that Louisiana's evidence of historic waters is "clear beyond doubt," neither are we in a position to say that it is so "questionable" that the United States' disclaimer is conclusive. We do decide, however, that the Special Master should consider state exercises of dominion as relevant to the existence of historic title. The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we

suggested in United States v. California, it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events. The only fair way to apply the Convention's recognition of historic bay to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. To the extent the United States could rely on state activities in advancing such a claim, they are relevant to the determination of the issue in this case. (394 U.S. at pp. 76-78).[11]

To this the Court appends what I consider to be a highly pertinent note:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. *It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic lawsuit.* The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in United States v. California. (394 U.S. at p. 77, Note 104 Emphasis supplied).

---

11. The record in the present case is clear that throughout their history the states have exercised jurisdiction over all of Mississippi Sound; however in my opinion this was not of such a nature that the United States could rely thereon in advancing a claim opposed by a foreign nation, as it was equally consistent with recognition of the sound as inland waters or territorial sea. This will be dealt with later.

The reference to the California case *supra*, in this note is to the following language:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. (381 U.S. at p. 168).

The first public disclaimer in regard to Mississippi Sound was made in April, 1971 (more than ten years after the ratification of the Geneva Convention by the United States, and more than two years after the decree in *United States v. Louisiana*, *supra*) by the publication of a set of 155 maps delineating the three mile territorial sea, the nine mile contiguous zone, and certain internal waters of the United States. These maps, which include the entire Gulf Coast, are available for sale to the general public and have been distributed to foreign governments in response to requests to the United States Department of State for documents delimiting the boundaries of the United States. They undoubtedly undertake to rescind the concession made by the United States in its brief in an earlier stage of this proceeding. However under the circumstances it is difficult to accept the disclaimer as entirely extrajudicial in its motivation. It would appear to be more in the nature of an attempt by the United States to prevent recognition of any preexisting historic title which might already have ripened because of past events but which was called into question for the first time in a domestic lawsuit.

In my judgment if Mississippi Sound was established as historic inland waters prior to the ratification of the

Geneva Convention by the United States (March 24, 1961) then it comes within the exception contained in Article 7, Section 6 thereof. Therefore, unlike the Special Master in *United States v. California*, *supra*, I must consider the letters from the State Department dated 1951 and 1952.

By letter dated October 30, 1951, the U.S. Attorney General sought the assistance of the State Department in preparing a position statement "as to the principles which govern the delimitation of the marginal sea along the coasts of this country and the demarcation of the boundary separating the marginal sea from inland waters." One of the subjects to which particular reference was made was "straits, particularly those situated between the mainland and offshore islands."

On November 13, 1951 Acting Secretary of State James E. Webb replied to this letter. In regard to bays generally, the Acting Secretary says:

> "(c) The determination of the base line in the case of a coast presenting deep indentations such as bays, gulfs, or estuaries has frequently given rise to controversies. The practice of states, nevertheless, indicates substantial agreement with respect to bays, gulfs or estuaries no more than 10 miles wide: the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands, for regulating the Police of the North Sea Fisheries, signed at The Hague, May 6, 1882, 73 Foreign and British State Papers, 39, 41; The North Atlantic Coast Fisheries Arbitration between the United States and Great Britain of September 7, 1910; U.S. Foreign Rel., 1910 at 166; and the Research in International Law of the Harvard Law School, 23 American Journal of International Law, 55, 266.)
>
> Subject to the special case of historical bays, the United States supported the 10 mile rule at the Conference of 1930[13] (Acts of Conference, 197-199) and the Second Sub-Committee adopted the principle on which the United States relied (Acts of Conference, 217-218). It was understood by most delegations that, as a corollary to the adoption of this principle, a system would be evolved to assure that slight indentations would not be treated as bays (Acts of Conference, 218). The United States proposed a method to determine whether a particular indentation of the coast should be regarded as a bay to which the 10 mile rule would apply (Acts of Conference, 197-199). The Second Sub-Committee set forth the American proposal and a compromise proposal offered by the French delegation in its report, but gave no opinion regarding these systems (Acts of Conference, 218-219)."

And in response to the specific inquiry as to straits:

> "With respect to a strait which is merely a channel of communication to an inland sea, however, the

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13. The Hague Conference. See Aide-Memoire, September 27, 1949, in which the State Department responded to the Norwegian Government's inquiry regarding the extent of the United States' territorial waters in part as follows:

> "With regard to the demarcation of the line separating inland waters from the territorial sea, and to the geographic method delimiting the territorial sea, the Embassy's attention is invited to the proposals made by the United Delegation to the Hague Codification Conference of 1930 with respect to the various Bases of Discussion regarding territorial waters there considered."

United States took the position, with which the Second Sub-Committee agreed, that the rules regarding bays should apply (Acts of Conference, 201-220)."

This letter was filed as an exhibit in *United States v. California*, *supra*, then pending before the Special Master. Pending at the same time before the International Court of Justice was *United Kingdom v. Norway* (the *Anglo-Norwegian Fisheries Case*) I.J.S. 1951 in which the United Kingdom took substantially the same position, relying in part upon the United States' argument in the *Alaskan Boundary Arbitration* (1903). In oral argument on September 27, 1951 (*before* the Attorney General's inquiry and the Acting Secretary of State's reply) the United Kingdom in the *Anglo-Norwegian Fisheries case* stated referring to *United States v. California*, *supra*:

> "It has been disclosed in hearings before a Committee of Congress that the Federal Government is maintaining before the master that the principles which the United States advocated at the 1930 Conference should be applied in drawing the boundary.
>
> . . . my general point is that the Federal Government before the Supreme Court is vigorously maintaining the principles which it advocated in 1930, and that this fact is entirely inconsistent with the Norwegian Government's interpretation of the United States' practice. It is clear that the Federal Government's views before the Supreme Court are perfectly in line with the United Kingdom's views in this Court." (*Memorial of United Kingdom, Pleadings, Oral Arguments, Documents, Fisheries case (United Kingdom v. Norway)* Vol. IV, pp. 88 and 89).

It therefore appears that even at that time the position of the United States was well known in the international community, and had been since the *Alaskan Boundary Arbitration* (1903).

As previously noted, on October 17, 1951, the Secretary of the Interior had advised the Governor of Mississippi that in accordance with that position the southern boundary of that state lay along the southern coast of the barrier islands.

On December 18, 1951 the International Court of Justice decided the *Anglo-Norwegian Fisheries Case* contrary to the contentions of the United Kingdom. Accordingly on January 22, 1952, the U.S. Attorney General inquired of the State Department whether it still adhered to the position stated in its letter of November 13, 1951. In a reply dated February 12, 1952 the Secretary of State said:

> "In the view of the Department, the decision of the International Court of Justice in the Fisheries Case does not require the United States to change its previous position with respect to the delimitation of its territorial waters. It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the Court not to have acquired the authority of a general rule of international law. Among these are the principle that the base line follows the sinuosities of the coast and the principle that in the case of bays no more than 10 miles wide, the base line is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres

to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951."

Both the letter of November 13, 1951 and that of February 12, 1952 were made a part of the record of hearings upon the Submerged Lands Act 43 U.S.C. 1301 *et seq.* In addition, on March 3, 1953 Jack B. Tate, Deputy Legal Advisor to the Department of State, appeared before the Senate Committee on Insular Affairs and testified as follows:

> "The position of the United States is that waters of bays and estuaries less than 10 miles wide—or which are, at the first point above such openings, less than 10 miles—are inland waters of the United States, and the territorial limit is measured from a straight line drawn across these openings. A strait or channel or sound which leads to an inland body of water, is dealt with on the same basis as bays."

The Submerged Lands Act 43 U.S.C. 1301 *et seq.* was enacted May 22, 1953. On March 6, 1961 the Solicitor General of the United States wrote to the Director of the Coast and Geodetic Survey proposing certain principles for determining the coastline along the Gulf of Mexico, one of which was:

> "Waters enclosed between the mainland and offlying islands which are so closely grouped that no entrance exceeds ten miles in width shall be considered inland waters.

To this the Director of Coast and Geodetic Survey replied under date of April 18, 1961:

> "RECOMMENDATION
>
> In applying the 10-mile rule to a group of screening islands along a coast, no opening between such islands should exceed 10 miles. In the case of a series of adjoining and interconnected bays, each bay should be considered as an independent geographic feature, subject to both the 10-mile and semicircular rules.
>
> Commentary
>
> (1) Limiting the distance between screening islands along a coast to 10 geographic miles is in accord with the general policy of the United States regarding minimum encroachment upon the high seas.
>
> (2) The theory of the screening islands is that the waters between them and the mainland are sufficiently enclosed to constitute inland waters (see Part I, Item (g)). Hence, the openings are in the nature of straits leading to inland waters, which (sic) in accordance with the State Department Letter of November 13, 1951, the rules for bays apply. A 10-mile limitation on the entrance width of a bay is one of those rules.
>
> (3) The recommendation as to adjoining and interconnected bays is made on the basis that the treatment recommended would make for greater simplification in the consideration of inland waters, and would prevent areas from being included in the inland waters category that would be mere curvatures but for the adjacent bays (see Fig. 3)."

On March 24, 1961 the United States ratified the Geneva Convention, which, as noted in United States v. California, supra, represented a departure from its previously held position; therefore the material quoted above

represents the publicly stated position of the United States from 1903 (*Alaskan Boundary Arbitration*) to that date. Under that position, there is no doubt that Mississippi Sound constituted inland waters, as none of its mouths exceeds ten miles in width. (See Stipulation No. 6).

No foreign government has ever protested this position. See Mississippi's First Set of Interrogatories, dated September 26, 1980 and United States' Supplemental Answer to Interrogatory 27 thereof, dated June 9, 1982. I am fully aware of the following language from United *States v. Alaska, supra*:

> In this case, we feel something more than the mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the government of those countries knew or reasonably should have known of the authority being asserted. (422 U.S. at p. 100).

However I believe that in the present case it has been shown that the government of other countries knew or reasonably should have known of the authority being asserted.

I therefore find that the proof in this case shows that Mississippi Sound meets the test laid down in United *States v. California, supra*, in that the United States has traditionally asserted and maintained dominion over it with the acquiescence of foreign nations. (381 U.S. at p. 172). It also meets the tripartite test of *United States v. Alaska, supra* (422 U.S. at p. 100):

1.) The United States has exercised authority over Mississippi Sound by the position which it has taken in international affairs, before the Supreme Court of the United States, in Congressional Hearings, and by fortifying Ship Island and patrolling other inlets to the sound.

2.) This exercise was continuous from 1803 (Louisiana Purchase) to 1977.

3.) Foreign states have acquiesced in this exercise of authority as they knew or reasonably should have known of its exercise and did not protest.

I therefore find that Mississippi Sound is a historic bay within the meaning of Article 7, Section 6 of the Geneva Convention.

HISTORIC TERRITORIAL WATERS

As I have stated earlier, in my judgment the activities of the states in Mississippi Sound are not of a nature that the United States could rely thereon in advancing a claim opposed by a foreign nation (394 U.S. at p. 76) but are rather of the nature of the claims rejected by the Court in the case of *United States v. Alaska, supra* (422 U.S. at p. 100). This is because those activities are equally consistent with Mississippi Sound as either territorial sea or inland waters. As I have heretofore found, in my opinion Mississippi Sound qualifies as historic inland waters; but if I am incorrect in that, it may still in its entirety (including the enclaves) qualify as historic territorial sea, for certainly the jurisdiction exercised by the states over the enclaves has been no different from that exercised by them over the balance of Mississippi Sound. As the court says in *United States v. Louisiana, supra*:

> Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the terri-

torial sea, the area would be territorial sea." Juridical Regime of Historic Waters, Including Historic Bays, supra, n. 27, at 23. (394 U.S. at p. 24, Note 28).

I make no finding in this regard, however, as I deem it to be beyond the scope of the reference to me as Special Master, which was limited to the motions of the states and of the United States for entry of a supplemental decree fixing the coastlines of Alabama and Mississippi. This issue would not be affected by whether the enclaves are open or territorial sea.

RECOMMENDATIONS

I therefore respectfully recommend that the motions of the states of Alabama and Mississippi be granted and that a supplemental decree be entered in accordance therewith, and that the cross-motions of the United States be denied.

WALTER P. ARMSTRONG, JR.
Special Master

Apr. 9, 1984

EXHIBIT A



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Supreme Court, U.S.
FILED
JUN 25 1984
ALEXANDER L. STEVAS
CLERK

No. 9 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA

Defendants.

(ALABAMA BOUNDARY CASE)

EXCEPTIONS OF THE STATE OF ALABAMA TO THE REPORT OF THE SPECIAL MASTER FILED APRIL 30, 1984, AND BRIEF IN SUPPORT OF EXCEPTIONS

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No. 9, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA

Defendants.

(ALABAMA BOUNDARY CASE)

EXCEPTIONS OF THE STATE OF ALABAMA TO THE REPORT OF THE SPECIAL MASTER FILED APRIL 30, 1984

EXCEPTIONS

The State of Alabama does not take exception to the reported recommendations of the Special Master or to the bases of those recommendations. Alabama does take exception to the Master's omission of specific, independent recommendations on two questions:

1. Did Alabama's Act of Admission, not on its face but as historically interpreted, recognize the dividing line between Mississippi Sound and the Gulf of Mexico, and establish the state's historic land boundary along the seaward side of Dauphin Island?

2. If Dauphin Island is an extension of the mainland, but Mississippi Sound as a whole is not a juridical bay, is there a smaller juridical bay enclosed by a line from the western extremity of Dauphin Island to Point aux Chenes on the mainland?

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IN THE

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OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA

Defendants.

(ALABAMA BOUNDARY CASE)

BRIEF IN SUPPORT OF EXCEPTIONS

SUMMARY OF THE CASE

The Special Master accurately and appropriately summarized the case in his report at pages 1-3. Alabama adopts this summary including the Master's characterization of the primary issue.

SUMMARY OF ARGUMENTS

I. HISTORIC LAND BOUNDARY

The Special Master found Alabama's Act of Admission did not, *on its face*, establish the State's southern boundary line (Rpt. 33). The Master did not consider whether Alabama's Act, *as historically interpreted*, recognized the dividing line between Mississippi Sound and the Gulf of Mexico and established the State's historic land boundary along the seaward side of Dauphin Island (Rpt. 33-34). Alabama believes if it can factually establish such a line as its admission boundary, the doctrine of *Pollard's Lessee v. Hagan*, 3 How. 212 (1845) guarantees the State ownership of all submerged land within that boundary.

II. SMALLER JURIDICAL BAY

The Special Master found the whole of Mississippi Sound to be a juridical bay; consequently, he did not then rule on Alabama's argument that a smaller bay exists on the eastern end of Mississippi Sound (Rpt. 8 n.3). If Dauphin Island is an extension of the Alabama mainland, but the whole of Mississippi Sound is not for whatever reason a juridical bay, Alabama requests a ruling that a juridical bay lies within Mississippi Sound east of a line from the western extremity of Dauphin Island to Point aux Chenes on the Mississippi mainland. *See* Attachment Four.

ARGUMENTS

I. HISTORIC LAND BOUNDARY

A. Background

In 1960, Alabama failed to establish its *seaward* boundary three leagues from its coastline. *United States v. Louisiana*, 363 U.S. 1, 82 (1960). The Court specifically denied the state's claim because there was neither preadmission nor postadmission facts which established or contemplated an Act of Admission boundary that included marginal seas. *Id.* at 13-30, 67-68. It was said of Louisiana's Act of Admission, 2 Stat. 701, and applied to Alabama's, 3 Stat. 489, that

"the act evidently contemplated no territorial sea whatever." *Id.* at 68. The Court concluded Alabama was entitled to rights in submerged lands lying three geographical miles from its coastline only by virtue of the Submerged Lands Act, 43 U.S.C. §1301 *et seq.* (1953). But the Court did not then determine the location of the state's coastline, 363 U.S. at 82 n.139, which is the issue of the present controversy. Alabama argued before the Special Master that *as historically interpreted* this coastline was coterminous with its Act of Admission boundary. The Master did not rule on that argument (Rpt. 33-34).

Alabama's Act reads in part, "thence, due south, to the Gulf of Mexico; thence eastwardly, including all islands within six leagues of the shore, to the Perdido River." 3 Stat. 489. It refers to one of two boundary lines, either a *seaward* boundary including marginal seas, which this Court held invalid, 363 U.S. at 82, or a *land* boundary enclosing the state's inland waters. If it is the latter, that boundary must lie along one of two areas, either the mainland as the United States contends, or Dauphin Island as Alabama contends.[1]

[1]The United States argued before the Master that in 1960 the Court located Alabama's Act of Admission boundary along the mainland. Preliminary Post-argument Memorandum at 2. The U.S. drew support from the Court's statements in *United States v. Louisiana*, 363 U.S. at 67-68, 91 (1960) as did the Master in his report (Rpt. 32). But those statements, as the Master characterized them, prohibited a finding that Alabama's Act of Admission, *on its face*, established a boundary on the seaward side of Dauphin Island. But as Alabama has argued, those statements did not prevent a factual finding that, as interpreted, the Act of Admission established a boundary line. The Court said only that the Act did not include all waters within three leagues of the coast. If it had intended something more specific, it never would have added in the same opinion, "We express no opinion at this time on the location of Alabama's coastline." 363 U.S. at 82 n. 139. For as a practical and legal matter, Alabama's Act of Admission boundary and its coastline are identical for purposes of this argument.

B. Applicable Legal Principles

In 1845, the Court held that the 13 original states owned the lands beneath navigable inland waters within their boundaries and that by virtue of the equal-footing doctrine each subsequently admitted state acquired similar rights. *Pollard's Lessee v. Hagan*, 3 How. 212 (1845).[1] In 1977, the Court reviewed *Pollard* and determined that the rights acquired upon admission vested on admission and were permanent. *Oregon v. Corvallis*, 429 U.S. 363 (1977). Writing for the majority, Justice Rehnquist stated, "*Pollard's Lessee v. Hagan* holds that the state receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union, and contains not the slight-

[1]Pollard's roots lie in the State Circuit Court of Mobile County, Alabama. *See generally, Jules Kreeg, ex dimise of the heirs of William Pollard v. James Thorp and John Hagan*, Cir. Ct., Mobile Co., Ala., Fall Term (1841), *partially reprinted in* 2 U.S. Sup. Ct. Transcripts of Records 972, 977-980 (1944), *aff'd sub nom., Kreeg, ex dim. Pollard's Heirs v. Thorp*, 3 Ala. 291 (1842), *aff'd sub nom., Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

The U.S. contends further that a state invoking the "historic boundary" provisions of the Submerged Lands Act is restricted to that boundary and can claim nothing further. Preliminary Post-argument Memorandum at 6. Alabama's argument is a simple, straight forward argument under *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). It is not based on the Submerged Lands Act; consequently, if Alabama's original land boundary circumscribed Mississippi Sound, as it does the other waters of the state, then those waters are inland quite apart from the Submerged Lands Act, as the U.S. conceded in 1960, 363 U.S. at 66 n. 108. Even if Alabama fails in this argument and all other arguments, at worst it could claim the lands the U.S. now contends Alabama owns. The Court made this clear in *United States v. Florida*, 420 U.S. 701 (1975). *Inter alia*, the decree, by stating, "Florida is entitled to all the lands, minerals, and other natural resources underlying the Gulf of Mexico extending seaward for a distance of 3 marine leagues *from its coastline or its historic coastline*, whichever is landward, *but for not less than 3 geographic miles from its coastline*" ("Historic coastline" used in the decree referred to the coastline as it existed when Florida became a state) (emphasis added).

est suggestion that such title is 'defeasible' in the technical sense of that term." *Id.* at 372. Subsequently he concluded, "Thus, if the lands at issue did pass under the equal-footing doctrine, state title is not subject to defeasance and state law governs subsequent dispositions." *Id.* at 378 (footnote omitted).

If the above is correct, two legal issues remain. Did the Submerged Lands Act alter the scope or effect of the equal-footing doctrine as applied in *Pollard*, and may the application of an international treaty to questions of vested state property rights devest a state of those rights? As to the first, Justice Rehnquist stated in *Corvallis*, "the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine, . . . The effect of the Act was merely to confirm the state's title to the beds of navigable waters within their boundaries as against any claim of the United States Government." 429 U.S. at 371. As to the second, the Court said in *Prevost v. Greneaux*, 19 How. 1 (1857), "certainly a Treaty, subsequently made by the United States with [a foreign nation] could not devest rights of property already vested in [a] state, even if the words of the Treaty had imported such an intention." *Id.* at 7, (parentheticals added).

Consequently if Alabama establishes an Act of Admission land boundary on the seaward side of Dauphin Island, the rights acquired on admission cannot be taken away. Neither the Submerged Lands Act nor the Convention on Territorial Sea and Contigious Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, affect those rights.

C. Applicable Facts

If the above legal analysis is correct, there remains only to determine whether the facts establish Alabama's historic land boundary along the seaward side of Dauphin Island. Alabama contends this boundary begins at the Alabama, Florida border on Perdido Bay and continues west

along the Fort Morgan Peninsula, Pelican Island, and Dauphin Island to the Alabama, Mississippi border. *See* Attachment One.[3]

1. Preadmission Descriptions

Based on the evidence before the Court in 1960, the Special Master found, "that during the period from 1756 and 1819 what is now Mississippi Sound was apparently considered by whatever nation possessed the surrounding mainland and islands as part of its possessions." (Rpt. 28)[4] These nations included Spain, France, and Great Britian and in this regard the Master's finding is significant. At the time of the creation of the Mississippi Territory, the Senate Committee studying the territory southward and westward of the State of Georgia had before it portions of Senate Document No. 105, 5th Cong., 2d Sess. 178 (1798), entitled "Boundary of Georgia and West Florida." (Al. Ex. 9-1; T. 261) The document discussed British boundary descriptions of West Florida. Of these descriptions the Senate wrote, "these documents are believed to be genuine, and have a tendency to explain the boundaries of Georgia and West Florida. *Id.*[5]

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[3]Additional facts supporting this argument are made in Alabama's Post Trial Brief and Post Argument Brief. A rebuttal to U.S. historical arguments is contained in Alabama's Reply-Post-Trial Brief at 2.

[4]The Master based this conclusion on the history discussed in *Foster and Elam v. Neilson*, 2 Pet. 253, 309-309 (1829), *Louisiana v. Mississippi*, 202 U.S. 1, 36-45 (1906), and *United States v. Louisiana*, 363 U.S. 1, 71-75 (1960).

[5]The Mississippi Territory as originally established did not include the area in dispute. 1 Stat. 549. The territory was enlarged in 1812 to include the area. 2 Stat. 734. The Alabama Territory was established from this enlarged area in 1817. 3 Stat. 371. However, prior to 1812 the area now in dispute was included in British West Florida.

The substantive part of the document reads, in reference to Peter Chester's appointment as Governor of British West Florida, "with these instructions you will receive our commission under our great seal of Great Britian, consituting you our Captain-general and Governor-in-Chief in and over our provinence of West Florida, in America, *bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast . . . .*" *Id.* (emphasis added)

The Mississippi Territory was established in the same year. 1 Stat. 549 (1798). That territory was enlarged in 1812 and the Alabama Territory was established in 1817 with a southern boundary which reads in part, "thence due south to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore . . . ." 3 Stat. 371, 372 (1817).

If, as the Master decided, Great Britian considered the water between Dauphin Island and the mainland as its possession, and Congress relied on the British boundary description to formulate Alabama's boundary, it may be assumed that Congress considered the area to be within the United States. Subsequent preadmission descriptions of the area and postadmission interpretations of Alabama's boundary confirm this assumption.

William Darby, a British explorer and geographer, visited the Alabama coast and wrote about it extensively. He was described by the United States' historical expert as one familiar with the States' Enabling Acts and aware of their boundary descriptions (T. 1399-1400). In 1817 Darby wrote, A Geographical Description of the State of Louisiana, the southern part of the State of Mississippi, and Territory of Alabama (1817) (Al. Ex. 15; T. 1225; Jt. Ex. 169; T. 1492).[6] There he specifically included the water area along Dauphin Island within the Alabama Territory. He wrote:

[6]Darby also published, The Emigrant's Guide to the Western and Southwestern States and Territories in 1818. It contained the identical passage quoted below. (Ms. Ex. 50; T. 1489)

> There is an elongation of the Alabama territory south of the 31° north latitude and lying between the east boundary line of the State of Mississippi and the Perdido River. This tract covers about 3850 square miles, including Mobile Bay, and the islands Dauphin, Massacre, Petitebois, *together with the expanse of water between the islands and the mainland.* This tract formed once a part of West Florida, and is of more importance from its position than from either its extent or production.

Alabama exhibit 15 (emphasis added).

In the same year the Standing Committee of the House of Representatives on the Public Lands had before it Authur Stansbury's document entitled, *Map of the State of Mississippi drawn for the use of the Standing Committee of the House of Representatives on the Public Lands.*[7] The applicable portion of the map as introduced labels the area above Dauphin Island as "Pascagoula Bay" separate and distinct from the Gulf of Mexico. (Jt. Ex. 40-29; T. 668, 685) This was the area described by Darby as the "expanse of water between the islands and the mainland." *See* Post Argument Brief of the State of Alabama, Appendix B(3).

2. Postadmission Interpretations

a. Dauphin Island Boundary

In 1827, J. Drayton produced *A Geographical, Statistical, and Historical Map of Alabama.* On the map m "gin he described Alabama as, "situated between 30° 12' and 35° N. lat." The map proper is calibrated along its left-hand border in ten minute segments up to 35° north latitude. Dauphin Island lies at 30° 12'. The mainland lies at 30° 20' (Jt. Ex. 40-39; T. 669, 686). *See* Post Argument Brief of the State of Alabama, Appendices A(28a), (b), and (c).

[7]The original of this map is housed in the Library of Congress which established the date as [1817].

In 1836, William Darby and Theodore Dwight wrote, *A New Gazetteer of the United States*. They placed Alabama's southern boundary at 30° 10′ (Ms. Ex. 53 at 8; T. 1497, 1498). Maps produced contemporaneously with the Drayton and Darby boundary interpretations support this location. One drawn by Curtis Lewis in 1820, *A Map of Mobile Bay in the State of Alabama* (Jt. Ex. 40-32; T. 669, 686) and another by Timothy Conrad in 1830, *A Travelers Pocket Map of Alabama* (Jt. Ex. 40-43; T. 669, 686) located Dauphin Island between 30° 12′ and 30° 13′ and the mainland at or near 30° 20′. *See* Post Argument Brief of the State of Alabama, Appendices A(3) and B(4).[8]

Dauphin Island currently lies near 30° 13′ north latitude (Jt. Ex. 1-11373; T. 669; and Jt. Ex. 45-3; T. 690). *See* Attachment Two.[9]

b. Gulf of Mexico — Mississippi Sound Boundary

This Court said of the State of Louisiana, "the boundary line is drawn down the middle of the river Iberville 'to the Gulf of Mexico,' not *into* it for any distance. The State is thence to be bounded '*by the said gulf* not by a line located three leagues out in the Gulf . . . ." *United States v. Louisiana*, 363 U.S. 1, 67 (1960) (emphasis in original). That boundary and the location of the Gulf of Mexico was established earlier as south of Cat Island. *See Louisiana v. Mississippi*, 202 U.S. 1, 58, *final decree*.

[8]The Curtis Lewis map was utilized by the Committee on Military Affairs of the U.S. House of Representatives in 1822. *See* Alabama Exhibit 17-7; T. 1094 and the Master's Report at 36 for a discussion of the Committee's actions.

[9]Dauphin Island, although growing east to west, has not grown north or south in recent geological time (Jt. Ex. 154* at 210; T. 535).

Alabama's boundary reads, "to the Gulf of Mexico" and is presumably subject to the same interpretation. The issue is, what was the understood location of the Gulf of Mexico at Alabama's statehood? Historical geographers, Congress and the Court have commented on this question.[10]

1. Historical Geographers

Geographers described the dividing line between the Gulf and Mississippi Sound principally in terms of the water area above Dauphin Island.[11] William Darby and Theodore Dwight, Jr. described the area as:

> Pascagoula Sound, is a sheet of water spreading along the southwestern border of Alabama, and the southeastern of Mississippi, extending in length 55 ms. from the Pass of Heron w. to the Pass of Christian, with a mean width of about 8 ms. *It is separated from the gulf of Mexico, by a chain of low, narrow sand islands, named, advancing from E. to W., Dauphin's, Massacre, Petite Bois, Horn, Dog, Ship and Cat island.* The depth of the water in the sound is generally about from 10 to 18 feet, but no vessels drawing more than 6 feet can be navigated through the passes. The depth increases rapidly on the Gulf side of the island.

[10]Conflicting oral evidence at trial was given by the parties' experts. The documentary evidence, save one exhibit, established a dividing line between the Gulf of Mexico and Mississippi Sound. An interpretation contrary to the States' is taken in United States Exhibit 14-8 (T. 1307). That document seems to place the Gulf of Mexico along the mainland although no direct statement of such is made. The descrepancy is based on one interpretation of Alabama's Enabling Act, Section 3, 3 Stat. 490 (1819). Alabama does not share that view. *See* Post Argument Brief of The State of Alabama at 15.

[11]This water area was known as Pascagoula Sound, Pascagoula Bay, and at times by its qualities with no name attached. The first description of the water area as "Mississippi Sound" was in 1845. (Jt. Ex. 191-25; T. 704), twenty-one years earlier than the Court noted in *Louisiana v. Mississippi*, 202 U.S. at 48.

Darby and Dwight, *A New Gazetter of the United States* (1830) (Ms. Ex. 55 at 394; T. 1508) (emphasis added).[12] In 1836, Darby and Dwight placed the Alabama boundary along the Gulf of Mexico at "lat. 30° 10' ", consistant with their earlier location of Alabama's land boundary and their above description of the water area. Darby and Dwight, *A New Gazetter of the United States* (1836) (Ms. Ex. 53 at 10; T. 1498). This interpretation is confirmed by a passage in the same document which reads, "The state is . . . very advantageously supplied with navigable rivers, though possessing within its own limits but one outlet to the Gulf of Mexico by Mobile Bay." (Ms. Ex. 53 at 10; T. 1498).

Other historical descriptions of Mississippi Sound agree. In 1844, Daniel Haskel and Calvin Smith wrote, *A Complete Descriptive and Statistical Gazetteer of the United States of America*. They described Pascagoula Sound as, "Situated off the mouth of Pascagoula r., in the Gulf of Mexico, from which it is separated by low, narrow islands. It is about 55 ms. long, with an average breadth of 8 ms." (Ms. Ex. 58 at 512; T. 1518). Some nine years later, John Hayward wrote, "Pascagoula Sound, Mi. and Aa., into which Pascagoula River empties, is separated from the Gulf of Mexico by several low, narrow islands. Its average breadth is 8 miles, and its length about 55 miles." *A Gazetteer of the United States* (1853) (Ms. Ex. 59 at 23, T. 1521). And in the same year Thomas Baldwin and J. Thomas wrote, "Pascagoula Bay, of the Gulf of Mexico, is situated at the S.E. extremity of the Mississippi, and at the mouth of

[12]Darby's understanding of the physical characteristics of Mississippi Sound is confirmed by modern scientific data. See Alabama exhibit 2-12, a U.S. Corps of Engineers' graph of water depth versus distance into the Gulf. Within 1,000 feet of Dauphin Island the depth drops ten feet. Within 2,250 feet the drop approaches 30 feet.

the Pascagoula River. Low narrow island separate it from the Gulf." *A New and Complete Gazetteer of the United States* (1853) (Ms. Ex. 60 at 884; T. 1528).[13]

2. Congress

The Master utilized Congressional material to find that Mississippi Sound was an historic bay (Rpt. 36-39). This identical material supports Alabama's contention that Congress believed the dividing line between the Gulf of Mexico and Mississippi Sound was along Dauphin Island. It is therefore unnecessary to reiterate it here except to emphasize that regardless of Congressional intent at the moment in time Alabama became a state, from that time forward Congress has considered the waters landward of Dauphin Island to be inland waters of Alabama.

3. Supreme Court of the United States

This Court held in *Louisiana v. Mississippi*, 202 U.S. 1 (1906) that the Louisiana and Mississippi Acts of Admission produced a dividing line between the states which followed a deep-water chanel *"through the northeast corner of Lake Borgne . . . south through Mississippi Sound, through South Pass between Cat Island and Isle d'Pitre, to the Gulf of Mexico . . . ."* *Id.* at 58, *final decree* (emphasis added). The

[13]Historical geographers described "Pascagoula Bay" as part of the Gulf of Mexico. The U.S. implied, if the Sound is part of the Gulf, the boundary description "to the Gulf" means, to the mainland shore. (See T. 506-507, 509-511). This Court used the phrase "enclosed arm of the sea" to describe Mississippi Sound. This connotes not only that one water body is part of the other, but also that there is a separation. (*See generally, Louisiana v. Mississippi*, 202 U.S. 1 (1906). The Court explained the phrase in *Cunnard v. Mellon*, 262 U.S. 100 (1922) by citing *Louisiana v. Mississippi* as precedent for the proposition that U.S. territory includes, "enclosed arms of the sea" *and* a "marginal belt of sea" extending out three nautical miles. *Cunnard* at 122. While Mississippi Sound may be considered a part of the Gulf (the sea) it is also an enclosed part of the United States separate from the Gulf for boundary purposes.

Louisiana, Mississippi, *and* Alabama boundary descriptions all read, "to the Gulf of Mexico." If the Gulf lies along the mainland, as the U.S. contends, the Court's finding of the Louisiana, Mississippi boundary would be inaccurate. Similarly, a finding that the Gulf lies seaward of Isle a' Pitre, Louisiana, and Cat Island, Mississippi, but not south of Dauphin Island would be inconsistent if not equally inaccurate. However, if the Gulf lies seaward of all the islands, this Court would be consistent with its predecessor's determination that Mississippi Sound, "is not an open sea, but a shallow arm of the sea . . . ." *Louisiana v. Mississippi*, at 52.[14]

c. Federal Government's Interpretation of Alabama's Boundary

From 1940 to the present various Federal agencies interpreted Alabama's boundary along the seaward side of Dauphin Island. The following is a summary:[15]

[14]The 1905 Court did not regard the Louisiana, Mississippi, and Alabama Acts as *in pari materia*. *See Louisiana v. Mississippi*, at 41. Alabama does not ask that the Acts be construed *in pari materia* but only that the factual finding of the location of the Gulf of Mexico be applied presently.

[15]The U.S. argued in its Post-trial Reply Brief at 24-25 that the Government's interests may not be forfeited through agencies' mistakes or negligence. This Court held in *United States v. California*, 332 U.S. 19, 34-40 (1947) that the interests of the Government in the *ocean* are not to be forfeited as a result of agencies' negligence. This is quite a different situation from the present. The question whether the Government does or does not own certain ocean areas can not be determined until Alabama's land boundary is located for purposes of *Pollard*. Government agencies' interpretations of that boundary are relevant and entirely

U.S. AGENCY OR OFFICIAL	INTERPRETATION
Department of Commerce; Bureau of the Census (1940)	The Alabama, Mississippi border traverses Mississippi Sound into the Gulf of Mexico. All waters east of that line are inland waters of the State of Alabama. Its land boundary is along the seaward side of Dauphin Island

appropriate to determine a *domestic* boundary of this nature. *See Louisiana v. Mississippi*, at 55-57 where the Court reviewed Government agencies' interpretations of the States' boundaries. The importance of federal interpretations of Alabama's boundary is that if the boundary is located along Dauphin Island, it will have no effect on the U.S. interrational boundary in the Gulf of Mexico. The seaward line would remain constant. The domestic boundary would eliminate only the high seas enclaves in Mississippi Sound. Here like the situation in *Skiroites v. Florida*, 313 U.S. 69 (1940), "no question of international law, or of the extent of the authority of the United States in its international relations is presented." *Id.* at 72. So being, the Court said in *Skiroites* "International law . . . is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties." *Id.* at 73.

Similarly, when the Court adopted the Geneva Convention for purposes of defining inland waters under the Submerged Lands Act it did so to establish, "a single coastline for both the administration of the [Act] and the conduct of our future international relations." *United States v. California*, 381 U.S. 139, 165 (1965). Implicit in that adoption is that international relations would be affected by a decision in a state "tidelands" dispute. There is no such effect here. The geographer for the U.S. Department of State testified that if Alabama's theories are accepted U.S. territorial waters would not be extended any further out to sea than they are presently (T. 2380).

In light of this the U.S. still maintains there is an impending international law issue. That is, their position serves the foreign affairs purpose of maintaining consistent U.S. foreign policy. As this is their only justification for application of international law to the issue, it fails. The Court said in 1969, "a contraction of a state's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. *United States v. Louisiana*, 394 U.S. 11 n.97 (1969).

	(Al. Ex. 22-1, Appendix B at 45; T. 1025-26).[16]
Secretary of the Interior (1951)	Mississippi's boundary is on the Gulf side of the barrier islands (Jt. Ex. 106-1; T. 669, 696).[17]
Acting Cadastral Survey Engineering Staff Officer (1954)	The approximate position of the line of ordinary low water for the State of Alabama is outside the inland waters of Mississippi Sound (Al. Ex. 16-3; T. 1094).
Director of the Bureau of Land Management (1956)	Based on Alabama's Enabling Act boundary the state's coastline follows the outer limit of Dauphin Island (AL. Ex. 16-8; T. 1094).
Solicitor General (1956)	*Louisiana v. Mississippi* located the boundary between Louisiana and Mississippi in the inland waters of Mississippi Sound. Brief of the United States in Support of Motion for Judgment, *United States v. Louisiana*, No. 11, Original, October Term (1956) at 17.

[16]The Master rejected Louisiana's argument that the Census Boundary constituted a system of straight base lines. Report of Walter P. Armstrong, Jr., Special Master, *United States v. Louisiana*, No. 9, Original, October Term (1974) at 11. Louisiana did not, however, argue this line was a legitimate *interpretation* of its historic land boundary. Alabama contends it is one of many such interpretations.

[17]The "Chapman Line" is the subject of this exhibit. This Court rejected Louisiana's estopple assertion against the U.S., as that assertion was partly based on the line. Louisiana did not assert the line as a legitimate *interpretation* of its historical land boundary. *United States v. Louisiana*, 394 U.S. 2 at n.97. The Master rejected the line as a system of straight baselines. *United States v. Louisiana*, Report of Walter P. Armstrong, Jr., at 10, but the Master did accept the line as a basis of his determination that Mississippi Sound was an historic bay. (Rpt. 41-44).

Solicitor General (1957)	In *Louisiana v. Mississippi* the Court described Mississippi Sound as inland waters. These inland waters passed to the state upon entry into the union under the doctrine of *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). Brief of the United States in Support of Motion on Amended Complaint, *United States v. Louisiana*, No. 11, Original, October Term, (1957) at 254.
Solicitor General (1957)	The water between the islands and the Alabama mainland is inland water. *Id.* at 261.
Director of the Bureau of Land Management (1958)	All tracts offered by Alabama in its 1958 oil lease sale, except those beyond three miles from the barrier islands, are proper (Al. Ex. 16-11; T. 1099).
G. Etzel Pearcy, Geographer for the State Department (1958)	Depicted on nautical charts 1266, 14th Ed., Rev. 10/6/58, and 1267, 6th Ed., Rev. 8/4/58, Alabama's land boundary and coastline are along the seaward side of Dauphin Island (Jt. Ex. 2; T. 669).[18]
Assistant Director, Bureau of Land Management (1963)	Mississippi's seaward boundary lies three miles from the mean low water line of the outer Mississippi Sound islands (Al. Ex. 16-3; T. 1094).

[18]This "Pearcy Chart" was not an official chart of the U.S. Government but was an interpretation of Alabama's boundary by Mr. Pearcy then Geographer for the U.S. Department of State.

Department of the Interior (1968)	On an outer continental shelf leasing map Mississippi's three geographical mile line is measured from the barrier islands (Al. Ex. 17-21; T. 1094).
Department of the Interior (1968)	On an outer continental shelf leasing map Alabama's three geographical mile line is measured from Dauphin Island (Al. Ex. 17-22; T. 1094).
Geological Survey (1970-1980)	On a U.S. Department of Interior Land Use map Alabama's political unit boundary is drawn along Dauphin Island (Al. Ex. 22-3; T. 1035-36).[19]
Geological Survey (1972-1980)	On a U.S. Department of Interior Land Use map Alabama's Land Use boundary is drawn along Dauphin Island. Mississippi Sound is classified as inland waters (Al. Ex. 22-5; T. 1032, 1034). *See* footnote 19 above.
Corps of Engineers (1973)	The Gulf of Mexico shoreline is along the barrier islands (Al. Ex. 17-25; T. 1094).

[19]This map and Alabama Exhibits 22-5 and 22-7 were produced in coordination with the State of Alabama pursuant to the directives in, "A Land Use and Land Cover Classification System for Use with Remote Sensor Data", Geological Survey Professional Paper 964 (Al. Ex. 22-4; T. 1032). That publication clearly specifies that water areas are included in the system, "only when they are considered to be inland water and therefore are included within the total area of the United States." *Id.* at 17, ¶ 54. The information depicted on the map is utilized by the State to plan, to develop, and to conserve resources. All land use planning is judged by this baseline (T. 1028).

The base map used for Alabama Exhibits 22-3, 22-5 and 22-7 is "Mobile, NH 16-4," the identical base map which was the initial subject of the present controversy (Al. Ex. 22-2; T. 1027). See Exhibit A, Report of Walter P. Armstrong, Jr., Special Master, filed April 30, 1984.

Geological Survey 1974-1980	On a U.S. Department of Interior Land Use map Alabama's Hydrologic Unit boundary is drawn along Dauphin Island (Al. Ex. 22-7; T. 1042, 1043). *See* footnote 19 above.
Environmental Protection Agency (1979)	The entire Alabama portion of Mississippi Sound is within the state for purposes of water pollution control. No enclaves are present (Al. Ex. 6-7, 6-8; T. 1059, 1060).
Commerce Department (1979)	Alabama's coastal zone boundary is along Dauphin Island and includes all coastal waters north to the ten foot contour line. No enclaves are depicted (Al. Ex. 21-6; T. 1086). *See* Attachment Three.[20]

The eighteen items above are similar to those discussed in *United States v. Maine*, 420 U.S. 515 (1975). The issue there was whether to reverse *United States v. California*, 332 U.S. 19 (1947). The issue here (see (b)(3) above) may be whether to change the boundary located in *Louisiana v. Mississippi*. Of the Maine situation the Court said:

> It is apparent that in the almost 30 years since California, a great deal of public and private business has been transacted in accordance with those

[20]Alabama's coastal zone boundary was determined in accordance with the U.S. Department of Commerce "Alabama Coastal Area Management Program and Final Environmental Impact Statement", August, 1979 (Al. Ex. 21-6; T. 1086). That program document identified all federally owned lands within Alabama's coastal area. No lands under Mississippi Sound were identified.

The boundary of Alabama's coastal area was approved by Robert W. Knecht, Assistant Administrator, National Oceanic and Atmosphere Administration. Mr. Knecht was the Office of Coastal Zone Management's representative at the Government's Baseline Committee meetings (T. 2385).

decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the "interminable litigation" arising over the controversy of the ownership of the lands underlying the marginal sea. See HR Rep. No. 215, 83rd Cong., 1st Sess., 2 (1953). Both the Submerged Lands Act and the Outer Continental Shelf Lands Act which soon followed proceeded from the premises established by prior Court decisions and provided for the orderly development of offshore resources. Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion mcf of natural gas, 13 million long tons of sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf. Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Worker's Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.

United States v. Maine, at 527.[21]

[21]The logic behind this reasoning is similar to the Court's admonition that "It would be quite [a step] to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic law suit." *United States v. Louisiana*, 394 U.S. at 77 n.104. The Master applied this principle in his historic bay discussion (Rpt. 46-57).

d. State of Alabama's Interpretation of Its Boundary

Alabama has conducted all of its relevant business in accordance with a southern boundary along Dauphin Island. Since 1930, the state has entered over 50 oil and gas leases in Mississippi Sound, many of which are in the specific disputed area (Al. Ex. 4-3, 4-4 and 4-5, leasing authority; T. 848, 959, 970; Jt. Ex. 39-1-1 to 39-1-29, seismic permits; T. 963; Jt. Ex. 39-2-1 to 39-2-287, oil and gas leases; T. 1234). Business conducted and permits issued under Alabama's coastal zone management program (Al. Ex. 21-1 to 21-7; T. 1086, 1089) water pollution control program (Al. Ex. 6-1 to 6-8; T. 1053-60) fishery management program (Al. Ex. 3-2 to 3-14; T. 810-848) and land use program (Al. Ex. 22-5, 22-4, 22-3, 22-7; T. 1034, 1032, 1036, 1043) were all based on the identical boundary.[22]

In 1939, prior to this Court's ruling that the states had no title to the marginal sea, *United States v. California*, 332 U.S. 19 (1947), Alabama entered into an oil and gas lease with W. L. Stewart for the entire Alabama portion of the Mississippi Sound (Jt. Ex. 39-2-3; T. 677). *See* Jt. Ex. 39-1-1 to 39-1-3 for an explanation of the area covered in this lease. In 1956, after this Court's ruling in the California case, Alabama entered into an oil and gas lease with W. H. Drinkard for the identical Alabama portion of Mississippi Sound (Jt. Ex. 39-2-90; T. 677). Both leases were based on a land boundary and coastline lying along the seaward side of Dauphin Island.

[22]Admittedly these activities may be exercised in both inland and territorial waters; but they are also, on the other hand, legitimate interpretations of Alabama's historic land boundary and are of the nature discussed in *United States v. Maine*.

Fishery management jurisdiction was assumed until questioned in February, 1980. (See Al. Ex. 12-3; T. 1094). The issue was resolved in 1983 when Congress confirmed the State's authority over enclave areas. *See* 16 U.S.C. §1856(a) (1983).

In 1929 Alabama's boundary was judicially interpreted in *Bosarge v. State*, 121 So. 427 (Ala. Cr. App. 1929), *cert. denied*, 121 So. 428 (Ala. 1929). The Alabama Court reviewed a criminal conviction relating to fishery management. The sole issue was whether the defendants were in Alabama waters. The Court based its decision on testimony which included the arresting officer's statement:

> The men were at the cut. You can make their position in any direction you mind from Dauphin Island. Any southerly direction. That is to say you can make it south or southwes', or south by west, almost any direction like that which would be southwardly. However, to make it clear they were outside of Dauphin Island about three quarters of a mile from the beach, and outside of the low water mark in the Gulf of Mexico. That is to say about three quarters of a mile from the beach.

Alabama exhibit 9-18; T. 1094.

After quoting Alabama's Enabling Act boundary with emphasis on, "including all islands within six leagues of the shore," the Court said:

> We think, and hold, that since Dauphine Island is admittedly *one* of the "islands within six leagues of the shore," referred to in the above description, and since there is no other such island lying *south* of Dauphine Island, necessarily the southern boundary line, or coast line, of Dauphine Island became the southern boundary line of Alabama.

Bosarge v. State, 121 So. at 428 (emphasis in orginal). The Court reasoned, based on *Manchester v. Massachusetts*, 139 U.S. 240 (1891), that if the State has territorial jurisdiction three nautical miles from its Dauphin Island boundary, the

defendants were within Alabama and subject to the State's criminal statutes as they were within three miles of Alabama's southern land boundary, the coast of Dauphin Island. *Id.*[23]

The above interpreted boundary has been a part of Alabama's Constitution since 1819 and its statutes since 1852. While Alabama incorrectly believed it owned all submerged lands within three leagues of its boundary, the state has never waivered on its interpretation of the point from which its inland waters are measured — the seaward side of Dauphin Island.[24]

II. SMALLER JURIDICAL BAY

The Special Master wrote, in relation to the state's argument that Dauphin Island is an extension of the mainland:

> Alabama also argues that if this is true and Mississippi sound as a whole is not a true bay, then a smaller juridical bay exists with a closing line from the western extremity of Dauphin Island to Point Aux Chenes. While this would appear to be true (. e Stipulations 4 and 5) it is unnecessary for me to pass upon this point in view of my subsequent findings.

---

[23]The holding is obviously prior to the 1947 *United States v. California* decision. The Alabama Court assumed the state had rights in the marginal sea. As the state did not, the conviction should have been reversed because the Court held the island boundary was a land boundary.

[24]Until this litigation arose, Alabama was never asked to prove the location of its land boundary. In fact, not until 1978 did it have notice that the U.S. opposed its claim to Mississippi Sound. *See* United States Answers to Second Interrogatories Propounded by State of Alabama, no. 10. And in addition, the U.S. intentionally withheld its position from Alabama in order to gain an advantage in litigation of this type. *See* Mississippi exhibit 101.

Report at 8 n.3.

Alabama seeks a ruling on this question to save a possible remand to the Master. Alabama's contention is depicted on Alabama Exhibit 8-3; T. 1221. A facimile is reproduced as Attachment Four.

The facts are undisputed. The parties stipulated that the line between Dauphin Island and Point aux Chenes is less than 24 nautical miles and that the area enclosed by the line satisfies the semi-circle test of the Convention on the Territorial Sea and Contigous Zone. The United State's international law expert testified that if Dauphin Island were an extension of the mainland, there is a sufficient indentation to satisfy Article Seven of the Convention (T. 1940). Consequently, all factors of the Convention are satisfied.

CONCLUSION

Alabama respectfully requests its Motion be granted and that a supplemental decree be entered establishing Alabama's land boundary and coastline along the seaward side of Dauphin Island.

Respectfully submitted,

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Special Assistant Attorney General

PROOF OF SERVICE

I, Benjamin G. Cohen, Special Assistant Attorney General for the State of Alabama and a member of the Bar of the United States Supreme Court, hereby certify that all parties to this action required to be served have been served with three copies of the *Exceptions of the State of Alabama to the Report of the Special Master filed April 30, 1984, and Brief in Support Thereof*, on this 24th day of June, 1984, by next day express mail, postage prepaid and properly addressed to:

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EDITOR'S NOTE

PAGES HERE TO THE END WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ATTACHMENT ONE

LAND BOUNDARY CLAIMED BY ALABAMA

LAND BOUNDARY CLAIMED BY
THE STATE OF ALABAMA

MOBILE

COUNTY

BALDWIN

COUNTY

MOBILE

FAIRHOPE

BAYOU LA BATRE

PERDIDO

DAUPHIN ISLAND

FORT MORGAN PENINSULA

LAND

BOUNDARY

PELICAN ISLAND

LINE

DENOTES DISPUTED AREA

STATE OF ALABAMA

DEPARTMENT of CONSERVATION
and NATURAL RESOURCES

SURVEY

DRAWN

REVISED

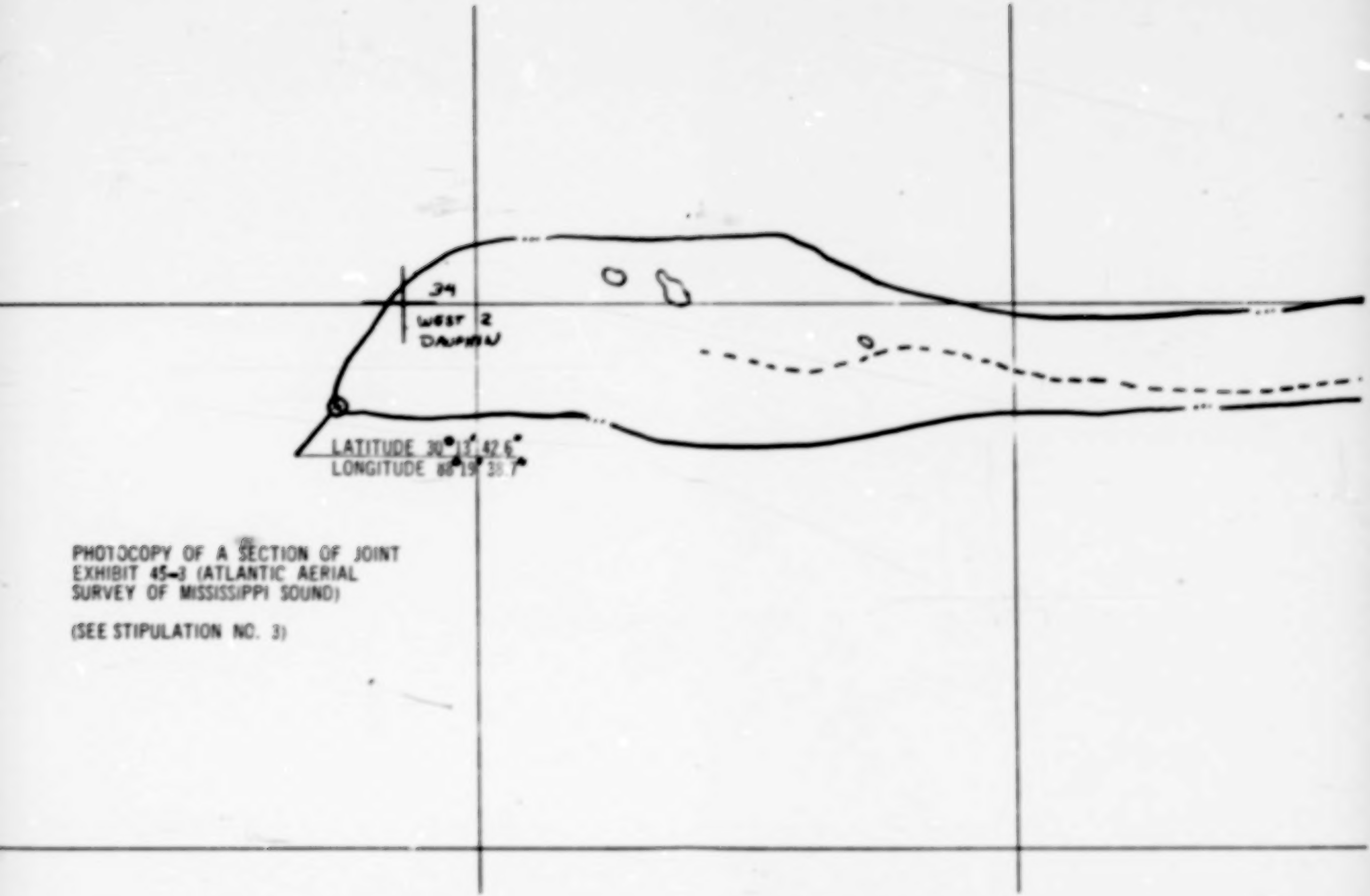
SHEET

DATE

DRAWING NO. 2-L-102

ATTACHMENT TWO

CURRENT DAUPHIN ISLAND LATITUDE



PHOTOCOPY OF A SECTION OF JOINT EXHIBIT 45-3 (ATLANTIC AERIAL SURVEY OF MISSISSIPPI SOUND)

(SEE STIPULATION NO. 3)

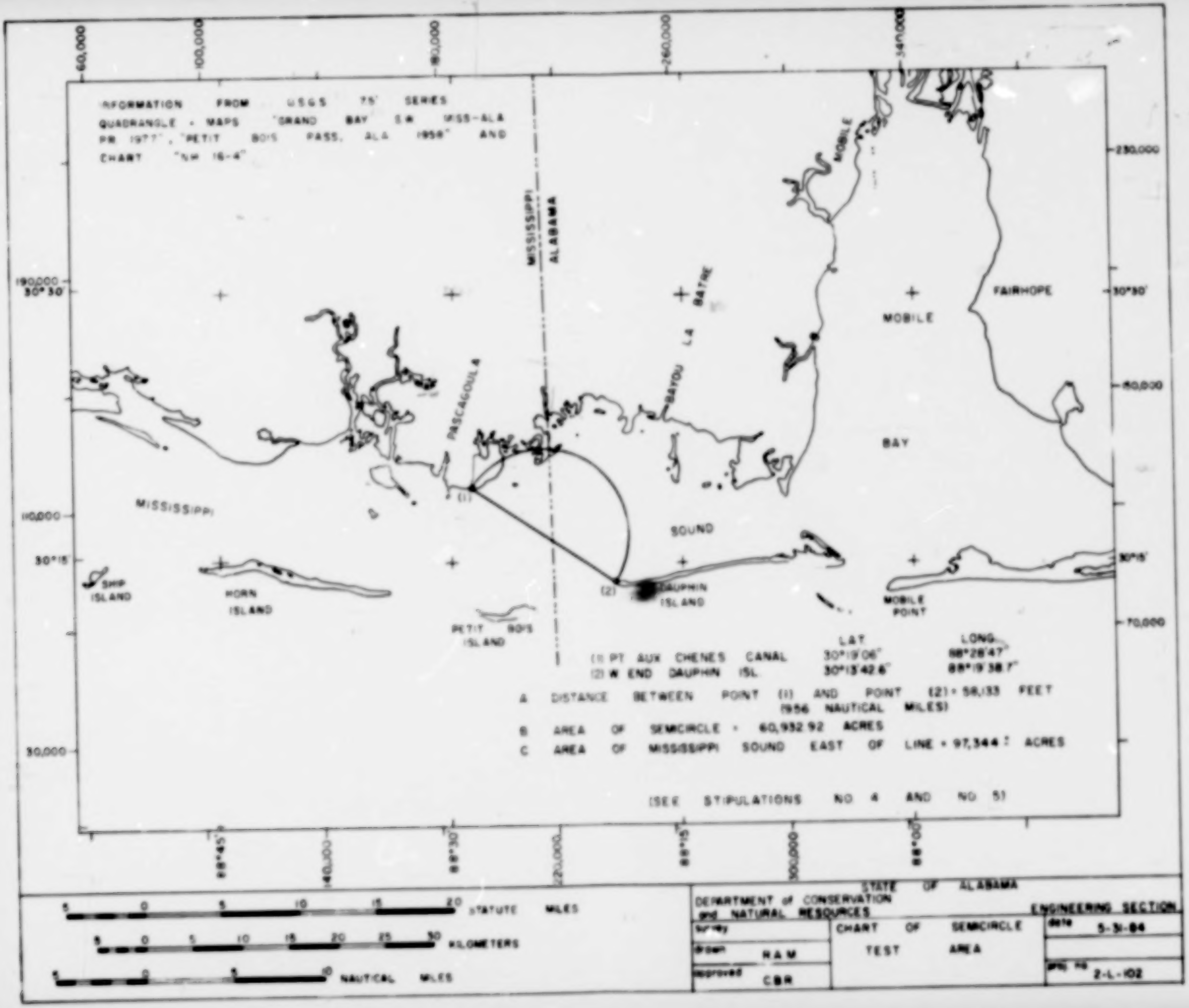
ATTACHMENT THREE

ALABAMA COASTAL AREA BOUNDARY


Figure 1-1 Coastal area boundary
Coastal Area boundary

ATTACHMENT FOUR

EASTERN MISSISSIPPI SOUND SEMICIRCLE TEST


INFORMATION FROM USGS 7½' SERIES
QUADRANGLE - MAPS "GRAND BAY SW MISS-ALA PR 1977", "PETIT BOIS PASS, ALA 1958" AND CHART "NOAA 16-4"
60,000
100,000
180,000
260,000
340,000
190,000
30°30'
110,000
30°15'
30,000
230,000
30°30'
50,000
30°15'
70,000
MISSISSIPPI
ALABAMA
MOBILE
FAIRHOPE
MISSISSIPPI
PASCAGOULA
BAYOU LA BATRE
MOBILE BAY
SOUND
SHIP ISLAND
HORN ISLAND
PETIT BOIS ISLAND
DAUPHIN ISLAND
MOBILE POINT
(1)
(2)
(1) PT AUX CHENES CANAL LAT 30°19'06" LONG 88°28'47"
(2) W END DAUPHIN ISL 30°15'42.6" 88°19'38.7"
A DISTANCE BETWEEN POINT (1) AND POINT (2) = 58,133 FEET (9.56 NAUTICAL MILES)
B AREA OF SEMICIRCLE = 60,932.92 ACRES
C AREA OF MISSISSIPPI SOUND EAST OF LINE = 97,344.1 ACRES
(SEE STIPULATIONS NO 4 AND NO 5)
5 0 5 10 15 20 STATUTE MILES
5 0 5 10 15 20 25 30 KILOMETERS
5 0 5 10 NAUTICAL MILES
STATE OF ALABAMA
DEPARTMENT of CONSERVATION and NATURAL RESOURCES
ENGINEERING SECTION
Survey
Drawn R A M
Approved C B R
CHART OF SEMICIRCLE TEST AREA
Date 5-31-84
Dwg No 2-L-102

Office Supreme Court, U.S.
FILED
JUN 25 1984
CLERK

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.
(ALABAMA AND MISSISSIPPI BOUNDARY CASES)

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES AND SUPPORTING BRIEF

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v.

STATE OF LOUISIANA, ET AL.
(ALABAMA AND MISSISSIPPI BOUNDARY CASES)

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES

The United States excepts to the Report of the Special Master insofar as it includes the following recommended rulings:

1. That Dauphin Island should be treated as part of the mainland and as one arm of a juridical bay;

2. That if Dauphin Island is properly treated as a part of the mainland, the juridical bay thereby created encompasses the whole of Mississippi Sound, rather than the area enclosed by a line from the western tip of Dauphin Island northwesterly to Point Aux Chenes on the mainland, just west of the Mississippi-Alabama boundary;

3. That, regardless of its status as a "juridical" bay, the whole of Mississippi Sound constitutes "historic" inland waters.

Instead, the United States urges the Court to fix the seaward limit of the submerged lands owned by the States of Mississippi and Alabama at the outer line of the territorial sea as depicted on official charts issued by the National Ocean Service.

Respectfully submitted.

REX E. LEE
Solicitor General

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Miscellaneous:

Carsway, *The Story of Ship Island*, 4 Journal of Mississippi History 76 (1942) 28
Hodgson & Alexander, *Towards An Objective Analysis of Special Circumstances* (1972) 19
Juridical Regime of Historic Waters Including Historic Bays, U.N. Doc. A/CN. 4/143 (1962) 21, 26
Weinert, *The Neglected Key to the Gulf Coast*, 31 Journal of Mississippi History 269 (1969) 28
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 9, Original

UNITED STATES OF AMERICA, PLAINTIFF
v.
STATE OF LOUISIANA, ET AL.
(ALABAMA AND MISSISSIPPI BOUNDARY CASES)

ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN SUPPORT OF ITS EXCEPTIONS

STATEMENT

In 1960, in renewed proceedings following passage of the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, this Court held that the grant of seabed to Alabama and Mississippi (like the grant to Louisiana and unlike the case of Texas and Florida) extends no more than three nautical miles into the Gulf of Mexico from their respective coastlines. *United States* v. *Louisiana*, 363 U.S. 1, 79-82, 83 (1960). See, also, the Decree entered at the following Term, 364 U.S. 502 (1960). The Court did not, however, locate the "coastline" from which that three-mile belt

is to be measured (363 U.S. at 66-67 n.108, 82 nn. 135 and 139), except to specify—in accordance with the Submerged Lands Act, 43 U.S.C. 1301(c)—that where State "inland waters" exist the coastline must be deemed to be "the line marking the seaward limit" of such inland water bodies. 364 U.S. at 503. Jurisdiction was retained to resolve any dispute in locating the relevant coastline. 363 U.S. at 84; 364 U.S. at 504.

In due course, it became clear that the parties disagreed about the status of Mississippi Sound, the water area immediately south of the mainland shore of Mississippi and Alabama, stretching from Lake Borgne at the west to Mobile Bay at the east. See Chart 1, App., *infra*.[1] The two States viewed the whole of Mississippi Sound as part of their "inland" (or "internal") waters, so that their coastlines only began at the islands fringing that Sound and lines connecting those "barrier islands." The United States, on the other hand, denied the inland status of Mississippi Sound and, accordingly, claimed as areas of exclusive federal interest those portions of the Sound that are more than three miles from any land (mainland or island) or undisputed inland rivers or bays. See BLM Leasing Map at Report 57. Such "enclaves"—comprising pockets of high seas in our view—exist because some of the barrier islands, or portions of them, are more than six miles from the mainland mass.

[1] As an aid to the Court, we have appended three charts to this brief. In each case, the base map is a simplified tracing from the BLM Leasing Map included in the Special Master's Report (at 57), slightly extended to include marginal areas to both the western and eastern ends of the Master's map. Our Chart 1 is intended to offer an unencumbered picture of the relevant geographical features.

To resolve this issue, the parties filed motions and cross-motions for a supplemental decree and the Court referred all the pleadings to its Special Master, already appointed in the *Louisiana Boundary Case*. 444 U.S. 1064 (1980); 445 U.S. 923 (1980). So, also, the Court later referred to the Master a Motion for Relief from Final Decree filed by Mississippi in order to avoid the preclusive effect of the Decree entered in 1960. 457 U.S. 1115 (1982). After extended proceedings, the Special Master has submitted his Report to the Court recommending a decree in favor of the States. In his view, the whole of Mississippi Sound qualifies as a "juridical" bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1609 (Report 7-22) and, in addition, satisfies the criteria for an "historic" bay, comprising inland waters (Report 22-55).

SUMMARY OF ARGUMENT

I

The Special Master first addressed the question whether Mississippi Sound qualifies as a "juridical bay" by satisfying the several tests announced by Article 7 of the International Convention on the Territorial Sea (which this Court has made applicable to coastline determinations under the Submerged Lands Act). A necessary premise of the Master's affirmative conclusion was that Dauphin Island, at the east of the Sound, should be deemed a part of the mainland mass to the north. That finding, we submit, is entirely unjustified and, indeed, inconsistent with this Court's specific precedents on the point—notably the rulings made in the *Louisiana Boundary Case*.

Apparently recognizing as much, the Special Master here relied on the circumstance that the island in question adjoins the concededly inland waters of Mobile Bay, which, in his view, should be assimilated to land. Once again, this ruling directly conflicts with the rejection of the same argument (both by the Master and the Court) in the *Louisiana Boundary Case*. The contention is, moreover, wholly at odds with the governing Convention, which does not confuse inland waters with mainland or treat islands abutting inland waters as peninsulas.

II

Even if the Special Master were justified in treating Dauphin Island as part of the mainland, it does not follow that the whole of Mississippi Sound constitutes a single juridical bay. The Master reached that result only by ignoring the first neutral question: What waters appear to be "enclosed" by Dauphin Island, once we accept the island as an extension of the mainland? A glance at the map tells us immediately that the closing line defining the "landlocked waters" of such a putative bay, beginning (as all agree) at the western tip of Dauphin Island, must proceed to the northern mainland, less than ten miles away, and not to Isle au Pitre, some five times more distant at the western end of the Sound. The same point holds good on the other side of the Sound, where a bay closing line anchored on Isle au Pitre would naturally aim for the near northern mainland, not easterly to remote Dauphin Island.

Accordingly, even if we must treat Dauphin Island as a part of the mainland, the resulting juridical bay is a much smaller one than the Special Master supposed. The water area defined, on the north, by the essentially unindented straight mainland coast, and,

on the south, by the barrier islands, no doubt would qualify for inland status under Article 4 of the Convention if the United States chose to invoke the straight baseline system permitted by that provision. But, as this Court has firmly settled, such a decision is reserved to the federal Executive. In the meanwhile, it is impermissible to bend the bay rules of Article 7 to achieve a result deliberately eschewed by the United States.

III

As an independent ground for his conclusion that the whole of Mississippi Sound is inland water, the Special Master ruled that the area should be deemed an "historic bay." In so holding, we believe the Master disregarded the very heavy burden resting on the proponents of such a claim, especially in the face of a formal disclaimer by the United States. At all events, the evidence summarized in the Report does not remotely show that, at any time during American sovereignty, the exclusion of peaceful foreign vessels was attempted, much less accomplished in such a notorious way, and for such a substantial period, as to ripen into an accepted usage.

At best, it was suggested that, at some unconnected periods, the United States, more or less officially, fashioned or accepted coastline delimitation principles that might have encompassed Mississippi Sound as inland waters. But this, if relevant at all, does not approach the demonstration, which must be "clear beyond doubt," of a ripened title acquired by openly adverse possession. Indeed, as it seems to us, the present case for historic title is substantially weaker than in the controversies involving California, Louisiana and Alaska, and, having failed there, the claim ought not be seen to succeed here.

ARGUMENT

I. DAUPHIN ISLAND IS NOT AN EXTENSION OF THE MAINLAND AND DOES NOT FORM A JURIDICAL BAY

1. If we put to one side his ruling on the claim of "historic inland waters" (see pages 20-33, *infra*), the Special Master was perfectly clear (and correctly so, in our view) that no part of Mississippi Sound—as distinguished from Lake Borgne at the west and Mobile Bay at the east and discrete small bays in between (see Chart 2, App., *infra*)—qualifies as a "juridical" bay under Article 7 of the Convention on the Territorial Sea unless Dauphin Island, at the eastern end of the Sound, properly can be treated as an extension of the mainland mass and, accordingly, deemed the headland of a bay. Report 3-12 & n.4, 18 n.7.[1] We therefore focus our attention first on the

[1] Thus, the Master expressly rejected an argument premised on what he termed "completely immaterial" evidence that the waters of Mississippi Sound and the northern shore of the barrier islands had "inland" characteristics. Report 3-4. In light of the terms of the Convention and the Submerged Lands Act, the Master likewise dismissed as not "pertinent" the alleged inaccessibility of the "enclaves" of high seas resulting from the federal position. *Id.* at 4. He also found that the United States had not "in fact," nor explicitly, adopted a system of straight baselines anchored on the barrier islands to enclose Mississippi Sound as inland waters under Article 4 of the Convention. *Id.* at 5-7. Pretermitting the question of "historic inland waters," the Master accordingly confined himself to determining whether Mississippi Sound meets the tests of Article 7 as a "juridical" bay. *Id.* at 7-22. In concluding that two of the basic criteria for such a bay are satisfied—a closing line not exceeding 24 miles and a well marked indentation containing land locked waters—the Master plainly relied on the premise that Dauphin Island is an extension of the mainland. *Id.* at 12, 18 n.7, 19. Indeed, there is no other way of satisfying Article 7. As the Master noted, a closing line to Mobile Point exceeds 24 miles, with no possible "fall back line," and, besides, Mobile Point being within Mobile Bay, a separate body of water, cannot be the headland of a bay encompassing Mississippi Sound. *Id.* at 10 n.4, 18 n.7. Yet, at the east, no other headland is available if Dauphin Island is treated as an island and therefore, as the Master agreed (*id.* at 8), cannot help form a bay.

dispositive question whether, in the eye of the law, Dauphin Island should, indeed, be viewed as a part of the mainland and not as the island that nature seems to have created.

In a different case, such an issue might invite discussion how much deference this Court, exercizing its constitutionally defined original jurisdiction, should accord to its Special Master's "finding." See *Colorado* v. *New Mexico*, No. 80, Orig. (June 4, 1984), slip op. 6. Compare *United States* v. *Louisiana*, 446 U.S. 253, 273 (1980) (Opinion of Powell, J.), with *Mississippi* v. *Arkansas*, 415 U.S. 289, 296-297 (1974) (Douglas, J., dissenting). But there is no occasion to debate that interesting question here because the Master's error is one of law. In no sense did the Master assess conflicting testimony or sift evidence to resolve any factual dispute. The facts underlying the conclusion that Dauphin Island is an extension of the mainland were never in controversy, and those on which the Master relied were for the most part stipulated or easily discernible from published charts. Nor did the Master choose among experts, accepting one opinion as more persuasive than another. His Report does not even advert to expert testimony and, indeed, his conclusion is confessedly the product of independent reasoning from agreed facts. And, finally, there is nothing complex or elusive about the issue.

In sum, this Court is at no disadvantage in deciding the question for itself, and certainly no special difficulty embarrasses the Court's determination whether the Master's reasoning is flawed in that he mistakenly treated water as land because it was inland. There is, in truth, no occasion to stray beyond the half-dozen pertinent pages of the Master's Report (at 12-18). No reference to the underlying record is necessary.

2. We do not here repeat the complete survey of this Court's precedents on island assimilation which we undertook in the Brief of the United States in Support of Its Exception at 8-19 in No. 35, Original, *United States* v. *Maine* (*Rhode Island* and *New York*).[5] Suffice it to say that, on the face of it, treating Dauphin Island as an extension of the mainland is entirely inconsistent with the teaching of those precedents. As the Special Master noted (Report 16-17, 18 n.7), Dauphin Island is "long and narrow," extending from east to west and lying at right angles to the "projection of Cedar Point," the nearest mainland, from which, however, it is separated by 1.6 miles of water, a "strait" some seven feet deep, exclusive of dredged channels.[6] Such a formation is ob-

[5] Copies of that brief have been served on opposing counsel.

[6] The Special Master wholly fails to explain why he discounts *dredged* channels. See Report 16. So far as we are aware, there is no basis for disregarding the existence, or *actual* depth and utility, of a channel simply because that reality is attributable in whole or in part to dredging, at least when the dredging has been undertaken for more than a century and presumably will continue indefinitely. The Court's rejection of dredged channels as qualifying "harbour works" in the *Louisiana Boundary Case*, 394 U.S. at 36-40, is, of course, irrelevant. Dredged channels were there found ineffective because they are not raised structures, not because they

viously less qualified, as a matter of geography, to be deemed a part of the mainland than many of the islands considered in the *Louisiana Boundary Case*, 394 U.S. 11 (1969); 420 U.S. 529 (1975), including the Isles Dernieres, twice rejected as forming "Caillou Bay." See U.S. Brief at 12-16, in No. 35, Original, *supra*.

Unsurprisingly, the Special Master (having served in the same capacity in the *Louisiana Boundary Case*) readily conceded the point. He expressly stated his belief (Report 13) that "the total water gap distance between the northern tip of Dauphin Island and Cedar Point on the mainland * * * is * * * more than was contemplated by the Court in the language quoted from *United States* v. *Louisiana*, *supra*." So, also, the Master correctly rejected the argument that "[t]he degree of development of the island for human habitation and use" somehow transformed Dauphin

are artificially created. Indeed, artificially caused extensions of the mainland that produce a new low-water line normally do change the coastline. See *United States* v. *California*, 381 U.S. 139, 176-177 (1965); *Louisiana Boundary Case*, 394 U.S. at 41 n.48; *United States* v. *California*, 447 U.S. 1, 5-8 (1980); *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273, 284-286 (1982). It seems obvious that like effect must be given to physical changes in the opposite direction attributable to artificial causes. And, to the extent that "the depth and utility of the intervening waters" is relevant in deciding whether an island should be treated as part of the mainland (*Louisiana Boundary Case*, 394 U.S. at 66), it ought not matter whether the channel is maintained by man or nature. We may add that the "legislative history" of the Convention makes it clear that navigability—whether natural or enhanced by man—is not to be taken into account, as a matter of international law, in determining whether a water body qualifies as a juridical l. v. The concept was deprecated as a vague one with no meaning except in terms of a particular vessel. 1 *Yearbook ILC* 220 (1955).

Island into an extension of the mainland. Report 13. As he unambiguously observed (*ibid.*), this has "no bearing upon the issue whatever." And, although somewhat equivocally adding that a bridge connection may be one indication (Report 13-14), the Master basically endorsed as "sound" the position of the United States that "the mere fact that it is connected to the mainland by a bridge or other artificial structure does not standing alone make Dauphin Island a part of the mainland." *Id.* at 13.[9]

On what basis, then, did the Special Master reach his conclusion that Dauphin Island must be deemed an extension of the mainland? However startling, the dispositive fact for the Master was "basically"

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[9] We cannot suppose the Master accorded significant weight to the fact that, in pre-history, Dauphin Island (like all of the other islands in the chain which the Master correctly concludes not to be proper extensions) was once connected to the mainland by a land bridge. Report 17. The same is undoubtedly true of the Santa Barbara Channel Islands in California, the Isles Dernieres in Louisiana and the Florida Keys, among other examples. Yet, in each case, the plea that the islands should today be treated as extensions of the mainland failed. See *United States* v. *California*, 381 U.S. 139, 170-172 (1965); *Louisiana Boundary Case*, 394 U.S. at 67 n.88; *United States* v. *Florida*, 420 U.S. 531 (1975), 425 U.S. 791 (1976); *Nor dam Louisiana* v. *Mississippi*, 202 U.S. 1 (1906), suggest that the barrier islands sheltering Mississippi Sound, or Dauphin Island in particular, should be treated as part of the mainland. The opposite is the case. That decision—the landmark precedent on assimilation of islands—pointedly distinguishes between the deltaic mass of alluvial "islands" forming St. Bernard Parish and the barrier islands. 202 U.S. at 46-48. Indeed, the Court there expressly measured the water gap between Dauphin Island and the mainland—an unnecessary exercise if Dauphin Island was part of the mainland, like Isle au Pitre. 202 U.S. at 48 (quoted at Report 29-30). See page 14, *infra*.

(Report 18) what he called the "unique and significant" circumstance (*id.* at 14) that Dauphin Island lies in the mouth of Mobile Bay and therefore "at least touches upon * * * inland waters of the State of Alabama," which waters "are to be subsumed under the general category of mainland," so that the island becomes "in effect, a peninsula." *Ibid.* In sum, inland waters should be treated as part of the mainland and, therefore, an island adjoining such waters merely extends that mainland. This is fiction run riot, which to indulge today is no less plain error than it would have been a decade ago when the same argument, advanced by Louisiana, was firmly rejected.

3. The strange fact is that, ten years ago in the *Louisiana Boundary Case*, the same Special Master himself exposed the flaw in the proposition that, for island assimilation purposes, inland waters should be treated as part of the land mass. In his Report of July 31, 1974, in the *Louisiana* case, Special Master Armstrong was considering the State's claim that certain islands should be treated as extensions of the mainland because, despite their relatively great distance from land, they were quite near the agreed closing line of a bay whose inland waters should be assimilated to land (*id.* at 40-42). His rejection of that contention merits extensive quotation (*id.* at 41-42):

> For reasons heretofore stated, except for the first of the series of islands on which the beginning point of the closing line is located, the islands in question do not bear the requisite relationship to the mainland at Southeast Pass to constitute extensions thereof. Louisiana insists, however, that once the closing line conceded by the United States is drawn, the waters within that closing line become inland waters and there-

fore constitute a part of the mainland, and that the relationship of the remaining islands to those inland waters therefore is in reality a relationship to the mainland which is sufficient to constitute them an extension thereof. Furthermore, Louisiana insists that once the nearest of the islands to that line has by this test been established as an extension of the mainland, then the relationship of the next most seaward island to the island so established constitutes it a further extension of the mainland, and thus by a kind of leapfrog relationship the furthest seaward of the islands relates back through the other islands and the waters of the bay to the mainland itself, all together constituting a single extension thereof sufficient to move the closing line seaward to the furthermost point on the low-water line of the furthermost island.

> While for some purposes inland waters may be considered a part of the mainland, they are nevertheless waters and not land, and therefore land bodies lying adjacent to them are not assimilable to them as such, but retain their characteristics as islands. It seems apparent that when in its opinion the Court used the term "mainland," it used it to refer to an existing body of land and not to inland waters. Otherwise, a small island lying many miles from the nearest solid land might by virtue of its proximity to a bay closing line be considered an extension of the mainland.

We entirely endorse these words, written in respect of the Garden Island Bay/Red Fish Bay complex. But an even closer parallel is, once again, to be found in Louisiana's claim to Caillou Bay, which depended on treating the chain of the Isles Dernieres as an extension of the mainland. See 1974 Report 49-51.

There, as here, at least one of the islands was not merely *near* inland water, but was actually "connected" to the mainland by inland waters and that fact was invoked by Louisiana in exactly the same way as Alabama has done in the instant proceedings. But the argument was rejected by the Special Master, and by the Court when renewed on Exceptions. See Appendix I to the Exceptions of Louisiana to the Report of the Special Master at 285-308, especially map at 302 (filed May 13, 1974); and the Court's Decree, 420 U.S. 529 (1975). It need hardly be said that the principle of equality of treatment among the States would not condone applying a more generous rule in favor of Alabama and Mississippi.

4. Precedent aside, the approach followed here is demonstrably wrong. Nowhere does the governing Convention on the Territorial Sea confuse inland water and mainland. Of course, a nation's sovereignty extends to both, with the consequence that the national "coastline" embraces inland or internal waters. But so are islands that appertain to the country jurisdictionally subject to the same regime as the mainland, without thereby eliminating the distinction between mainland and islands. In one case, it is true, the Convention treats islands as water for computation purposes. See Art. 7(3). There is no reverse rule, however. On the contrary, the text is explicit in distinguishing islands in the entrance of a bay which create multiple mouths and the water gaps in between. *Ibid.*

Thus, Article 7(3) of the Convention—in applying the semi-circle test and the 24-mile rule—measures only the water gaps between the mainland and the island or islands in the mouth of the bay. This is, obviously enough, a recognition of the separateness

of islands, even when they adjoin inland waters. And it is equally an express acknowledgement of the difference between mainland and inland water. Indeed, the rule of measuring water gaps demonstrates that all islands in the mouth of a bay cannot, on that account, be deemed part of the mainland, for (as the Special Master himself recognized, Report 22 n.8) it is settled that water gaps would not be counted at all in the case of an island treated as an extension of the mainland. See *Louisiana Boundary Case*, 394 U.S. at 62 n.83.

The proposition suggested by the Special Master has never been endorsed by the Court or by any commentator—certainly not by any of the geographers referred to in the passage from the *Louisiana Boundary Case* quoted at pages 14-15 of the Report.* Indeed, the Court presumably rejected this contention in affirming the Special Master's Report in the Louisiana case in 1975. 420 U.S. 529. See pages 11-13, *supra*.

5. Finally, it should be stressed that the Special Master's assimilation of inland waters to land would, if accepted here, invite substantial mischief in other cases. As we have already noticed, Special Master Armstrong himself identified the potentially endless "leap frog" effect of the doctrine, as put forward in the *Louisiana Boundary Case*. Page 12, *supra*. Other

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* The Special Master is plainly mistaken in suggesting that the Court construed the Convention as mandating that "islands * * * within the mouth of a bay * * * are to be considered as part of the mainland for *all* purposes." Report 16. All the Court meant (394 U.S. at 55) was that, just as only the water crossings should be counted in determining the length of a closing line partly formed by islands when applying the semi-circle test, the same principle should be followed for other Article 7 purposes, notably in applying the 24-mile rule.

scenarios easily can be envisioned, even if the principle is limited to islands that actually "touch" inland water. Nor is there any logical reason why a bay closing line itself, without any island present, ought not form the "arm" of another bay if the water behind the line is deemed land and the closing line is equated to a mainland shoreline.

Many coastal States whose legal coastlines have not been judicially determined are waiting in the wings, ready to adapt this novel theory to their own coasts if, after a false start in Louisiana, it succeeds in neighboring Mississippi and Alabama. Accordingly, we urge the Court once again to repudiate the proposition. For limited purposes, it may be useful to view inland waters as land. But a fiction must keep its place. As Justice Holmes wrote for the Court in another context, "a fiction [should] not [be] allowed to obscure the facts, when the facts become important." *Blackstone* v. *Miller*, 188 U.S. 189, 204 (1903).

II. ASSUMING THAT DAUPHIN ISLAND IS PROPERLY TREATED AS AN EXTENSION OF THE MAINLAND, THE WHOLE OF MISSISSIPPI SOUND NEVERTHELESS DOES NOT QUALIFY AS A JURIDICAL BAY

Having determined that Isle au Pitre at the west of Mississippi Sound and Dauphin Island at the eastern end both should be treated as part of the mainland and proper bay headlands (Report 11, 18), and that those two points can be connected by a series of lines bridging the water gaps between the barrier islands totalling less than 24 miles (*id.* at 12, 18), the Special Master all too easily concluded that the whole of Mississippi Sound qualifies as a juridical bay. *Id.* at 18-22. This, we believe, is a patently erroneous application of controlling standards. In our

view, the right result—if, contrary to our primary argument, Dauphin Island must be treated as an extension of the mainland—is to recognize two discrete and unconnected bays: the first, on the west, comprising Lake Borgne and that portion of Mississippi Sound enclosed by a line running north from Isle au Pitre to the easterly promontory of Bay St. Louis; the second, on the east, closed by a line from the westernmost point of Dauphin Island to Point Aux Chenes on the mainland. See Chart 3, App., *infra*. The water area between these two bays, we submit, is not a bay, nor any part of a bay, but rather a narrow "corridor," some 50 miles long and at most ten miles wide, that can be enclosed as inland water only under the straight baseline system of Article 4 of the Convention on the Territorial Sea, which, for better or for worse, the United States has eschewed.

1. Our point is obvious enough when the map is consulted. See, *e.g.*, Chart 1, App., *infra*. If we ignore the waterways cutting through the deltaic mass at the lower left of our map and treat Isle au Pitre as the tip of that peninsula,[1] it seems natural to close off the sheltered waters at the west by drawing a

[1] The formal stance of the United States, indicated on official large-scale charts, has been that the proper southern headland of the bay at the west of Mississippi Sound is a formation slightly west of Isle au Pitre. However, as the Special Master recites (Report 10), we admitted that Isle au Pitre properly "might" be treated as an extension of the mainland, and the Master so held (*id.* at 11). We do not now except from that conclusion. Under our submission that the only bay at the western end of the Sound is defined by a closing line to the eastern promontory of Bay St. Louis on the northern mainland, it makes no practical difference whether the southern anchor point of that line is Isle au Pitre or a more westerly point.

line *northerly* to the relatively near mainland of Mississippi, not *easterly* to a point on Dauphin Island five times more distant. See Chart 3, App., *infra*. And the same approach no less forcibly suggests itself at the other end of the Sound. Supposing Dauphin Island to be connected to Cedar Point, we easily discern a sheltered water body defined by the long westerly projection of Dauphin Island and a line to the near mainland at the north, most generously the headland selected by both Alabama and the United States, Point Aux Chenes. See Report 8 n.3; Chart 3, App., *infra*. Here, also, it is entirely artificial to stretch a closing line some 50 miles west to Isle au Pitre.

The Special Master went astray, as it seems to us, because he began with the wrong question. His focus was on Mississippi Sound as a single unit and, with that "mind-set," he applied the Convention tests to determine if they foreclosed recognition of the putative bay. In our view, that approach improperly prejudiced the outcome. Instead, the Master should have asked: What is the natural boundary of the internal waters defined, on one side of the Sound, by the headland of Isle au Pitre, and, on the other, by the headland of Dauphin Island? Once the indicated closing lines of the separate bays had been drawn to the northern mainland, it would have been perfectly clear that the main body of Mississippi Sound in between could not qualify as a bay, or as part of one, under the presently governing standards of Article 7 of the Convention.

2. It will no doubt be said that we ignore the barrier islands "sheltering" the central portion of Mississippi Sound and that their presence justifies the Special Master's conclusion. That is, indeed, the method followed by the Master: he invoked the is-

lands to shorten the closing line to less than 24 miles (Report 12, 18), to reduce the diameter on which the semi-circle test is based (*id.* at 18), and, also, to find that the Sound as a whole qualifies as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast," in accordance with Article 7(2) (Report 18-22). But, once again, this is reasoning backwards.

The Court has firmly settled that "Article 7 [of the governing international Convention] does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland." *Louisiana Boundary Case*, 394 U.S. at 67 (footnote omitted). It is common ground that the barrier islands, other than Dauphin Island, cannot be deemed extensions of the mainland. Report 8. Therefore, those islands must be conceptually erased in considering whether the long central stretch of Mississippi Sound qualifies as part of a bay. So viewed, it seems obvious that nature has carved no "well-marked indentation" into the essentially flat mainland coast, and that the waters of the central Sound are in no sense "landlocked" within "the jaws of the mainland."

Yet, unless a bay-like indentation exists, there is no warrant *for* going further and applying the special "island fringe" rules—given that Article 4 of the Convention is not in play. *See note 2, supra.* The exceptional procedure of counting only the water gap portions of a closing line is followed when, "because of the presence of islands, an indentation has more than one mouth" (Art. 7(3))—not where there is no indentation. *See Louisiana Boundary Case*, 394 U.S. at 55. So, also, there *must* be a bay before one reaches the question whether a closing line should be

pulled inward or bent outward on account of fringing islands not intersected by a direct headland-to-headland line. It was to aid in the resolution of that issue, left undecided by this Court (394 U.S. at 58-60 & n.79), that Drs. Hodgson and Alexander devised the "50% test," cited by the Special Master here. Report 21.* But, contrary to what the Master apparently believed, the test was never meant to determine whether given waters qualified as a bay. *See* Hodgson & Alexander, *Towards An Objective Analysis of Special Circumstances* 17, 20 (1972).

3. At the end of the day, the Special Master appears to have acquiesced in a plea to force the hand of the United States, which has consistently declined to invoke Article 4 of the Convention to enclose Mississippi Sound with a system of straight baselines anchored on the barrier islands. To be sure, the end result seems reasonable enough. Presumably, international law would not invite it unless that were so. Nor would we have once described Mississippi Sound as inland if such a claim involved plain overreaching. But, the apparent "reasonableness" of the Master's

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* Indeed, it is only by applying this 50% test that a closing line of less than 24 miles can be fashioned for Mississippi Sound. It appears that a straight line between the western tip of Dauphin Island and Isle au Pitre would intersect only Petit Bois Island, and a revised line anchored on the western tip of the latter island would touch no other barrier island before reaching Isle au Pitre. Thus, the total water portion of the closing line would far exceed 24 miles unless the line is pulled inward to follow the course of the barrier islands. The Court has not decided whether this is ever proper. *Louisiana Boundary Case*, 394 U.S. at 58-59 n.79. We nevertheless believe that such a "drawing inward" would be appropriate here, *if* there were indentation, because the islands account for more than 50% of the closure.

ultimate conclusion cannot justify it. The Court has stressed that the decision whether to use straight baselines is reserved to the national Executive and is not subject to judicial review. *United States* v. *California*, 381 U.S. at 168; *Louisiana Boundary Case*, 394 U.S. at 72-73. Obviously, it is no more permissible to achieve the same end by misapplying the bay rules of Article 7. Yet, as we believe, that is what has happened here. We therefore urge the Court—if it accepts the fiction that Dauphin Island is an extension of the mainland—to redraw the boundary of the bay formed by that island as a line from its western tip to Point Aux Chenes on the mainland to the north. See Chart 3, App., *infra*.

III. MISSISSIPPI SOUND IS NOT PROPERLY DEEMED AN HISTORIC BAY

The Special Master's alternative holding that Mississippi Sound qualifies as historic inland waters is no less surprising than his creation of a Dauphin Peninsula. If anything, this ruling even more sharply conflicts with the Court's jurisprudence on the subject, and, indeed, with the Special Master's own earlier historic inland water analysis in the *Louisiana Boundary Case*. Yet, once again, our disagreement with the Master turns on no disputed fact, nor on the relative weight accorded to expert testimony. Here, also, only the Master's legal reasoning is implicated; and the Court can assess the correctness of his conclusion without going beyond the facts recited in the Report itself (at 28-55).

1. The Court has unambiguously prescribed the standards which govern a claim to historic inland water. *Louisiana Boundary Case*, 394 U.S. at 23-29, 76-78; *United States* v. *Alaska*, 422 U.S. 184, 189, 196-203 (1975). What must be shown is (1) the successful exercise of authority over the area as inland water; (2) long continuity to that exercise; and (3) unequivocal foreign acquiescence in the claim. The cases demand a demonstration that sovereignty was exerted to exclude foreign navigation and other presence from the area. A historic bay claim cannot be proved by showing enforcement of State or Federal laws against United States nationals. Nor is mere absence of protest sufficient where there has been no unambiguous inland water claim.

The reason for requiring such clear evidence is that historic claims, by definition, do not satisfy the juridical rules. As ad hoc exceptions, they cannot be known to the international community, much less accepted by it, unless the assertion is notorious. Moreover, being a "non-conforming use," "historic" title does not immediately spring into legal existence when it suits the coastal state to assert it: it only gradually ripens when recognized by the community of nations, after long and open exercise of dominion. In effect, such historic title is acquired by "adverse possession," a persisting trespass ultimately validated by time and acquiescence. *Juridical Regime of Historic Waters Including Historic Bays*, U.N. Doc. A/CN. 4/143, at 46 (1962), cited in *Louisiana Boundary Case*, 394 U.S. at 76 n.103. Beyond this, as the Court noted in *Alaska*, 422 U.S. at 197, the exercise of authority must be commensurate in scope with the nature of the title claimed. Therefore, proof of historic *inland* water requires assertions of sovereignty—to exclude all foreign navigation in innocent passage—which are inconsistent with any lesser juridical status. And the exercise of sovereignty must be specific to the particular body of

water. Adherence to general rules that might encompass the claim now advanced will not suffice. Nor, indeed, will mere declarations avail, even specific statutes, unless implemented by actual possession for so long as to constitute a usage.

The requisite degree of proof is significantly increased when, as here, the United States officially *disclaims* sovereignty over the area. To be sure, such a disclaimer is not itself dispositive. If only to prevent the federal government from "abandon[ing]" an earlier "consistent official international stance" "solely to gain advantage in a lawsuit to the detriment of [a State]" and from impermissibly "contracti[ng] a State's recognized territory" (*Louisiana Boundary Case*, 394 U.S. at 74 n.97, 77 n.104), the Court has "indicated its unwillingness to give the United States • • • complete discretion to block a claim of historic inland waters." *Id.* at 77. But the rule remains that a State claim to historic waters will survive a federal disclaimer only if it is "*clear beyond doubt*" that historic title has "*already ripened* because of *past* events." *Louisiana Boundary Case*, 394 U.S. at 77 & n.104 (emphasis added); *United States* v. *California*, 381 U.S. at 115. No State heretofore has met that burden of proof; California, Louisiana, Florida and Alaska each have unsuccessfully advanced historic bay claims. There is no warrant for singling out Mississippi Sound as a uniquely stronger case.

2. That the Special Master here was the first to reach the elusive goal is, we submit, a consequence of winking at the established rules and ignoring the posted road signs. His Report indiscriminately recites the history of the Gulf Coast and the history of the federal positions on delimitation matters generally. He tells us that our predecessor sovereigns—

the Spanish, French and British—all thought they owned Mississippi Sound (Report 28); that, following the Louisiana Purchase, there was congressional discussion reflecting appreciation of the Sound as an artery of "interior water communication" and a "channel of important commerce" (*id.* at 36-39); that, during our Civil War, a fort was built on Ship Island, thereby showing that we were prepared to repulse belligerent entry into the Sound (*id.* at 38); that, in the early twentieth century, this Court, in adjudicating the lateral boundary between Louisiana and Mississippi, described the Sound as an enclosed arm of the sea wholly within United States territory (*id.* at 29-33); that, later this century, the United States suggested or agreed to various formulations of international law under which bodies of water like Mississippi Sound might have been regarded as internal (*id.* at 40-54); that some agencies and officers of the United States acquiesced in the States' view that the Sound was within their boundaries (*id.* at 42-43); and, finally, that, earlier in this tidelands litigation, we conceded the inland status of Mississippi Sound (*id.* at 32, 47). In the Master's view, the United States disclaimer—embodied in the 1970 publication of official charts depicting territorial sea lines in the Sound, obviously inconsistent with its character as inland waters—came too late in the day, and was impermissibly motivated by this domestic law suit (*id.* at 47). Therefore, the "claim" which had previously been announced to the world must be allowed to survive (*ibid.*).

This somewhat casual approach, we submit, is wholly at odds with the governing standards announced by the Court. In the end, what the Master has done is to hybridize the juridical and historical inquiries. The core of his holding is that Mississippi

Sound, if no longer a juridical bay satisfying the standards of the Convention to which we adhered in 1961, must be treated as an historic bay because, under earlier conceptions or proposed rules, it did qualify as internal water. That is simply no basis for an "historic bay" determination. Nor do the facts recited independently sustain such a claim, as we now demonstrate.

3. The bulk of the States' evidence at trial concerned the Spanish, French and British colonies. Much testimony and many documents were presented on the diverse means by which those sovereigns sought to ensure the security of their outposts. The Royal Navy had vessels patrolling the coast from Pensacola towards New Orleans (Rea Tr. 230-231). The Spanish employed a sort of coast guard as well, which deployed among the Alabama and Mississippi shores with the objective of preventing privateering (Holmes Tr. 438-440). Experts opined that the British and French thought that they possessed (under boundary descriptions similar to those with which Alabama and Mississippi were admitted to the Union) everything —water column, seabed and islands out to 6 leagues from the coast (Rea Tr. 291). The Spanish were said to be even more expansive, asserting sway over the entire Gulf all the way to the Yucatan (Holmes Tr. 445-446, 515).

It appears, however, that these prior sovereigns did not in any way differentiate *inland* from *territorial* jurisdiction. Moreover, as Alabama itself admitted below (Alabama Main Post Trial Brief 225), "evidence indicates that foreign nations did not acquiesce in French, British or Spanish exercise * * *." (See Holmes Tr. 504-510; Rea Tr. 280-282.) Thus, it is doubtful whether any of the colonial powers effectively reduced Mississippi Sound to an inland water

regime. But, even if they had, that would tell us little, if anything, about the status of the Sound as internal waters of the United States after American acquisition of the area, or as inland waters of Mississippi and Alabama after their admission to the Union.

Indeed, it hardly can be maintained that, where no private rights were at stake, the United States was bound to follow the practice of prior sovereigns in claiming offshore waters or water bottoms, whether as "inland" or "territorial." We were free to be more restrained in the interest of freedom of the seas (see *United States* v. *California*, 332 U.S. 19, 32-33 (1947)), or, within the limits permitted by international law, to be more expansive (see *Manchester* v. *Massachusetts*, 139 U.S. 240, 263-264 (1891)). Moreover, upon their admission to the Union on an equal footing, the States at least presumptively relinquished any unusually broad offshore rights derived from earlier history. *E.g.*, *United States* v. *Texas*, 339 U.S. 707, 716-720 (1950); *United States* v. *Maine*, 420 U.S. 515, 522-524 (1975). Of course, Congress could later retrocede submerged lands out to generous maritime boundaries it had once approved. *United States* v. *Louisiana*, 363 U.S. 1 (1960); *United States* v. *Florida*, 363 U.S. 121 (1960). But, except as the United States chose to confirm them, colonial claims are wholly irrelevant. *See United States* v. *Louisiana*, 363 U.S. at 35, 38, 71.

In a different case, the critical moment might be when Mississippi and Alabama became States, in 1817 and 1819, respectively. But that is an investigation already concluded, which disappointed both States. *United States* v. *Louisiana*, 363 U.S. at 79-82. As the Special Master here recognized (Report 29-35), the Court has long since rejected the argu-

ment that the Acts of Admission, on their face, assert any claim to the waters or submerged lands of Mississippi Sound. *Id.* at 91, 92. Accordingly, we pass on to later events.

4. The Master apparently accords considerable significance (Report 36-38) to early recognition in the American government that "[t]he chief navigational utility of Mississippi Sound is intracoastal." He draws this conclusion from documents evidencing the legislative debate that began in the early 1820s over the military security of the Gulf Coast region in general. He chooses from these documents a series of anecdotal references to the Sound as a "little interior sea," a "broad interior water communication," a "broad sheet of water * * * [t]hrough [which] passes the inland navigation * * *." And, indeed, we readily accept that Mississippi Sound historically has been used as a conveyor of an intracoastal waterway because of its (for the most part) shallow and sheltered water. But this does not remotely establish the inland character of the Sound.

Many maritime areas in the world are similarly not international waterways. The mere absence of foreign vessel traffic, however, is no signal of historic (or, for that matter, juridical) inland water. See *United States* v. *California*, 381 U.S. at 171-172. These geographic factors and the economic consequences which flow from them are not recognized in international law as significant to an historic bay claim. *Juridical Regime of Historic Waters*, *supra*, at 34-35. Moreover, the upshot of all the Committees' debate over what measures to take to protect this area was the conclusion that Mississippi Sound was so "open" as to be indefensible against foreign military encroachment.[9] To the extent that the world was listening, the message conveyed was that the United States would *not* attempt to exclude foreign ships and claim Mississippi Sound as a "mare nostrum."

5. The Master seems to place almost dispositive reliance on the eventual construction of Fort Massachusetts on Ship Island. Adverting to that event, the Report states (at 38): "There could hardly be a clearer indication that the United States claimed the waters north of that island as its own, and was prepared to repel any belligerent attempt to enter them, although it was never called upon to do so; and any foreign nation which was in the least attentive must have been aware of that fact." Both factually and legally, we suggest the Master has made too much of too little.

Work on a permanent fortification on Ship Island was not begun until 1859, progress was delayed because of a lack of funds and the advent of the Civil

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[9] President Monroe's view (Alabama Exhibit 17-18, at 259) was that "when the distance from one point to another is considered, it is believed that it would be impossible to establish works so near to each other as to prevent the landing of such [an enemy fleet]." In 1822, the House Committee on Military Affairs concluded that it would be inappropriate to waste resources on a post at Dauphin Island because it could neither protect the Mobile Bay ship channel nor the pass between Mobile Bay and Mississippi Sound. It could not protect the coasting trade or provide relief from a blockade (Joint Exhibit 137). In 1840, the Senate Committee on Military Affairs determined not to incur the expense to build forts on Ship or Cat Islands because these could not protect all of the passes to the Mississippi and Alabama mainland coast, and because "there is not supposed to be * * * a single object comparatively of high value on that part of the coast" (Joint Exhibit 139).

War, and it was never completed. The Union garrison apparently destroyed the fort in May 1861. The Confederates were slow to occupy it, not taking it over until early July of 1961, and they evacuated the island after setting fire to the buildings and lumber on September 17 of the same year. For two years, the island was the headquarters of the West Gulf Blockading Squadron and the base of operations for attacks on the Confederate forts guarding the mouth of the Mississippi. In October 1864, the island fort was turned into a prison camp for Confederate soldiers and was so used until the end of the war. In 1870, the last garrison was withdrawn from the fort, and in 1875, it was abandoned altogether. See Weinert, *The Neglected Key to the Gulf Coast*, 31 Journal of Mississippi History 269-301 (1969) (United States Exhibit 14-15); Caraway, *The Story of Ship Island*, 4 Journal of Mississippi History 76-83 (1942) (United States Exhibit 14-26).

It is not obvious how the story of the Ship Island fort can be marshalled in support of an historic bay claim. It says nothing about the exclusion of foreign navigation; it goes to the United States' suppression of its civil insurrection. What is more, even if the building of a fort—never really completed—is some evidence of some kind of claim, the abandonment of that fort within 15 years suggests a retreat from the claim. To repeat the Master's words, "any foreign nation which was in the least attentive must have been aware of that fact" as well. To the extent that the short history of Fort Massachusetts is instructive for our case, it indicates, once again, that the United States quickly abandoned any claim to Mississippi Sound as an "internal" bay.

At all events, a military fort is not usually designed to impede peaceful vessels engaged in "innocent passage." As the Master himself put it, the presence of Fort Massachusetts at best shows an intent "to repel any *belligerent* attempt to enter [the Sound]." Report 38 (emphasis added). Yet, of course, such a stance is appropriate not only for inland waters but also with respect to a nation's *territorial* waters. See *Louisiana Boundary Case*, 394 U.S. at 22-26. And, as we believe, that is the character of most of the waters of the Sound, including the several passes between the barrier islands, a 3-mile protective belt around each of them and adjoining the mainland coast, and, perhaps most important, the sea route to New Orleans through Lake Borgne. In short, even the actual interdicting of enemy warships is not remotely an assertion of *inland* water status for the area involved. Obviously, mere preparations to that end cannot be so viewed.[20]

6. The Master finds (Report 29-22, 39) more corroboration for his growing thesis that the Sound has historically been looked upon as inland in passages from the opinion in *Louisiana* v. *Mississippi*, 202 U.S. at 36-48. In rejecting the contention of Mississippi that the Sound was open sea in which the doctrine of thalweg ought not apply, the Court there said (202 U.S. at 48):

> Mississippi's mainland borders on Mississippi Sound. This is an inclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward

[20] We note, additionally, that the United States has military installations in places as distant from its internal jurisdiction as the Azores and Cuba, which are intended to afford some measure of control over belligerent use of sea lanes and airspace. Surely it can be suggested that continuous maintenance of these installations transforms all of the intervening water into our historic bays.

> from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them six miles wide. Such openings occur between Cat Island and Isle à Pitre; between Cat and Ship Islands; between Ship and Horn Islands; between Horn and Petit Bois Islands; between Petit Bois and Dauphin Islands; and between Dauphin Island and the mainland on the west coast of Mobile Bay.

We do not agree with the Master that this language constitutes a holding that Mississippi Sound was inland water. Certainty, that is not a necessary reading, as the Court focused on the fact that the water gaps are less than six miles—twice the breadth of *territorial* water. The States' contention (*e.g.*, Mississippi Main Post Trial Brief 14) that the Court was applying "customary international law" in 1906 seems clearly contradicted by the Court's decision in the second *California* case, 381 U.S. at 164, that there was, before the Geneva Convention, "no international accord on any definition of inland waters • • •." At all events, as the Master himself observed (Report 31-33), the United States is not bound by a ruling in lateral-boundary litigation to which it was not a party. Indeed, the Court has twice dismissed *Louisiana* v. *Mississippi* as having no bearing on federal-state disputes over maritime belts or submerged lands. *United States* v. *California*, 332 U.S. at 37; *United States* v. *Louisiana*, 363 U.S. at 70.

7. We cannot, of course, avoid the point that in our 1958 Brief in Support of Motion for Summary Judgment on Amended Complaint in the earlier phase of this case (at 254), we construed *Louisiana* v. *Mississippi* as describing Mississippi Sound as inland water which therefore passed to the States on their entry into the Union. But that embarrassment is no greater here than with respect to like concessions concerning Chandeleur Sound and Caillou Bay on the Louisiana coast. See *United States* v. *Louisiana*, 363 U.S. at 67 n.108. Louisiana's attempt to invoke estoppel was firmly rejected by the Court. *Louisiana Boundary Case*, 394 U.S. at 66-67 n.87, 73-74 n.97. The same result is appropriate here.

It is equally unjustified to conclude from the statement in the cited brief or anything else, as the Master does (Report 32-33), that "for more than half a century it was accepted by the United States that • • • Mississippi Sound was inland waters." The 1958 brief was apparently the first occasion on which the United States specifically addressed that question." And the stance then taken barely survived the decade. In 1961 the United States ratified the Convention on the Territorial Sea which, as this Court soon held, required the explicit drawing of straight baselines to accord inland water status to areas screened by islands that do not qualify under the bay rules. *United States* v. *California*, 381 U.S. at 167-169; *Louisiana Boundary Case*, 394 U.S. at 67-71. Having marked no such straight baselines enclosing Mississippi Sound on its official charts, the United States was at least impliedly recanting any claim to the Sound as inland. See Convention, Art. 4(6), reproduced in 381 U.S. at 168 n.34 and 394 U.S. at 68

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[11] As the Special Master sets out (Report 42-43), the Secretary of the Interior had in 1951 in a letter to the Governor of Mississippi agreed that the oil and gas leasing rights inside the barrier islands would go to the State. Of course, this is reminiscent of the circumstances of the first *California* case, 332 U.S. at 39-40, where Interior Department officials also had expressed a belief that California owned the seabed resources in question. The Court, ruling that the paramount rights in the territorial belt rested with the United States, stated that those rights may not be forfeited through agencies' mistakes or negligence.

n.89. The improvident error of counsel in a single sentence of a later brief filed in a controversy with Louisiana alone, is entirely unlikely to have been noticed beyond the parties and obviously does not, standing alone, amount to an effective assertion of inland jurisdiction. See Reply Brief for the United States at 20, in *United States* v. *Louisiana*, No. 9, Orig. (filed Sept. 1968).

8. Finally, the Master recites (Report 42-45) a variety of generalized antecedent formulations of what international law should or might be. He discusses the Webb letter of 1951 (*id.* at 48-50), in which the Acting Secretary of State attempted to describe the principles of delimitation employed by the United States in its conduct of foreign policy, which we invoked in the second *California* case as the governing rule under the Submerged Lands Act. Although this is far from clear, it may be that Mississippi Sound would have fit within those principles, which were first propounded at the 1930 Hague Conference. But whatever the outcome of such an anachronistic inquiry, it cannot affect the States' historic bay claim.

The dispositive fact is that the Court has squarely rejected the relevance of the Webb letter and other pre-Convention formulations for coastline delimitation. *United States* v. *California*, 381 U.S. at 163-165. It can hardly have been intended that these discarded sources would nevertheless control inland water disputes on the premise that States could establish historic bay claims simply by showing that their water bodies might have qualified under some outdated juridical principles. Accordingly, it seems to us a wholly academic exercise to match Mississippi Sound against the criteria which the United States advanced in the Alaska Boundary Arbitration of 1903

(Report 51), the Boggs formulae of the 1930s (*id.* at 41), the principles underlying the Chapman Line of 1950 (*id.* at 41-42), or the understanding evinced by the parties in the *Anglo-Norwegian Fisheries Case* in 1951 as to the general American postulates concerning waters behind closely fringing islands (*id.* at 50-51). The most that could be said from the material culled by the Master is that foreign governments might have had an inspecific impression that the United States favored, before the Convention, a regime under which it might have been permissible to draw some straight baselines to fringing islands in some circumstances. Assuredly, no foreign government could have deduced from these general formulations that the United States was making a specific claim to Mississippi Sound. What is more, as even the States urged upon the Master, the essence of a historic bay claim is a squatter's adverse possession, as opposed to occupation supposedly consistent with international rules.

In sum, the States have entirely failed to demonstrate effective, persistent and notorious exercise of inland jurisdiction over Mississippi sound such as might have ripened into historic title. As it seems to us, the evidence in the present record, as summarized by the Special Master, is significantly weaker than it was in the cases involving California, Louisiana and Alaska—where at least some instance of arresting foreign fishermen was shown.[10] Accordingly, we deem it plain that the present claim should be rejected.

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[10] For the arrest incidents in those cases, see *United States* v. *California*, 381 U.S. at 174-175; Report of the Special Master of July 31, 1974, at 20-21, in No. 9, Orig., *United States* v. *Louisiana*, approved, 420 U.S. 529 (1975); *United States* v. *Alaska*, 422 U.S. at 201-203.

CONCLUSION

The Report of the Special Master should be disapproved insofar as it recommends that Dauphin Island may be treated as an extension of the mainland and a proper headland for an Article 7 bay in Mississippi Sound, and insofar as it recommends that Mississippi Sound be declared an historic bay. Instead, the United States urges the Court to fix the seaward limit of the submerged lands owned by the States of Mississippi and Alabama at the outer line of the territorial sea as depicted on official charts issued by the National Ocean Service.

Respectfully submitted.

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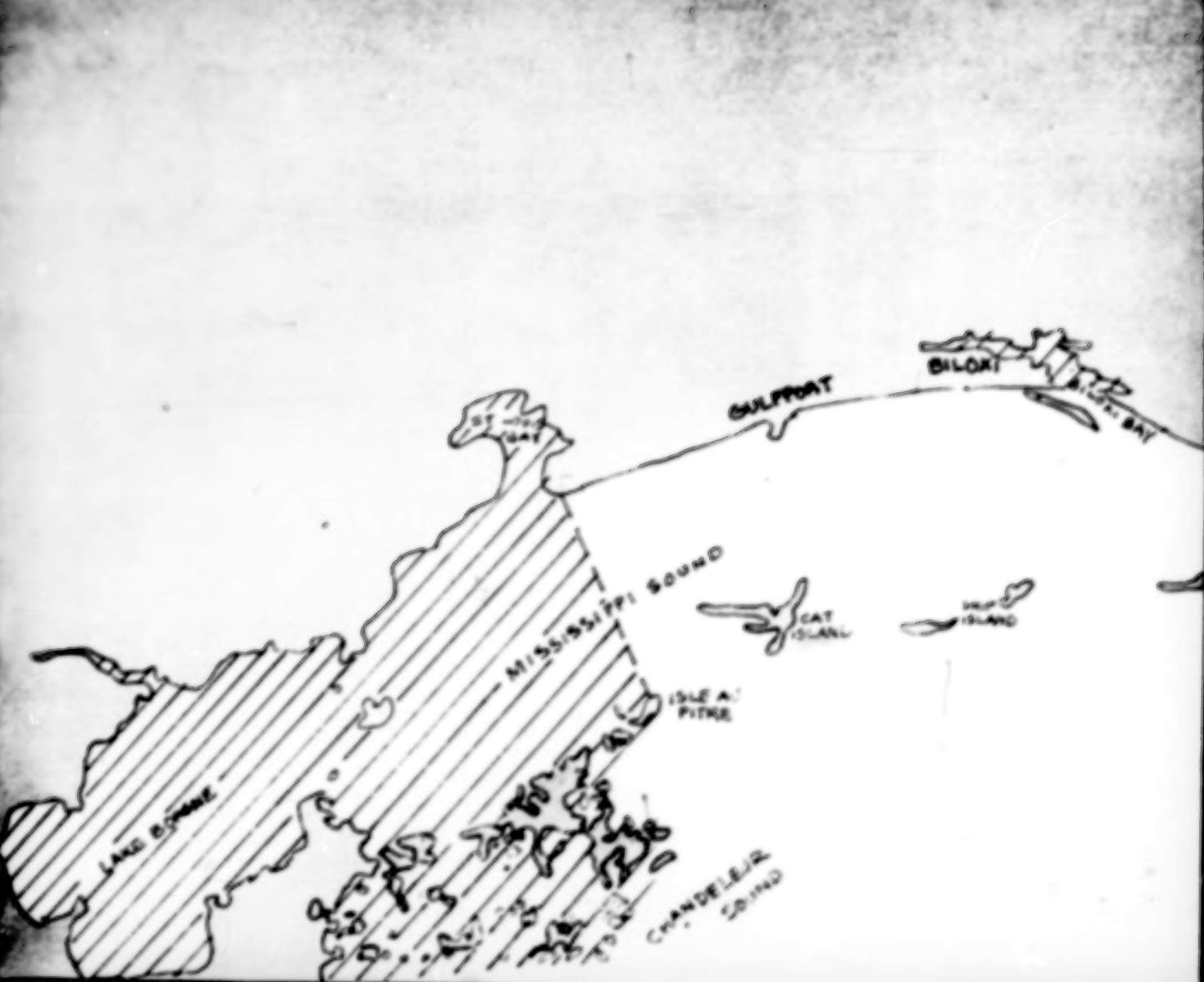
JUNE 1984


DULUTH
SUPERIOR
MISSISSIPPI SOUND
LAKE SUPERIOR



CHART 1

BEST AVAILABLE COPY


GULFPORT
BILOXI
MISSISSIPPI SOUND
CAT ISLAND
ISLE AUX PITRE
LAKE BORGNE
CHANDELEUR SOUND

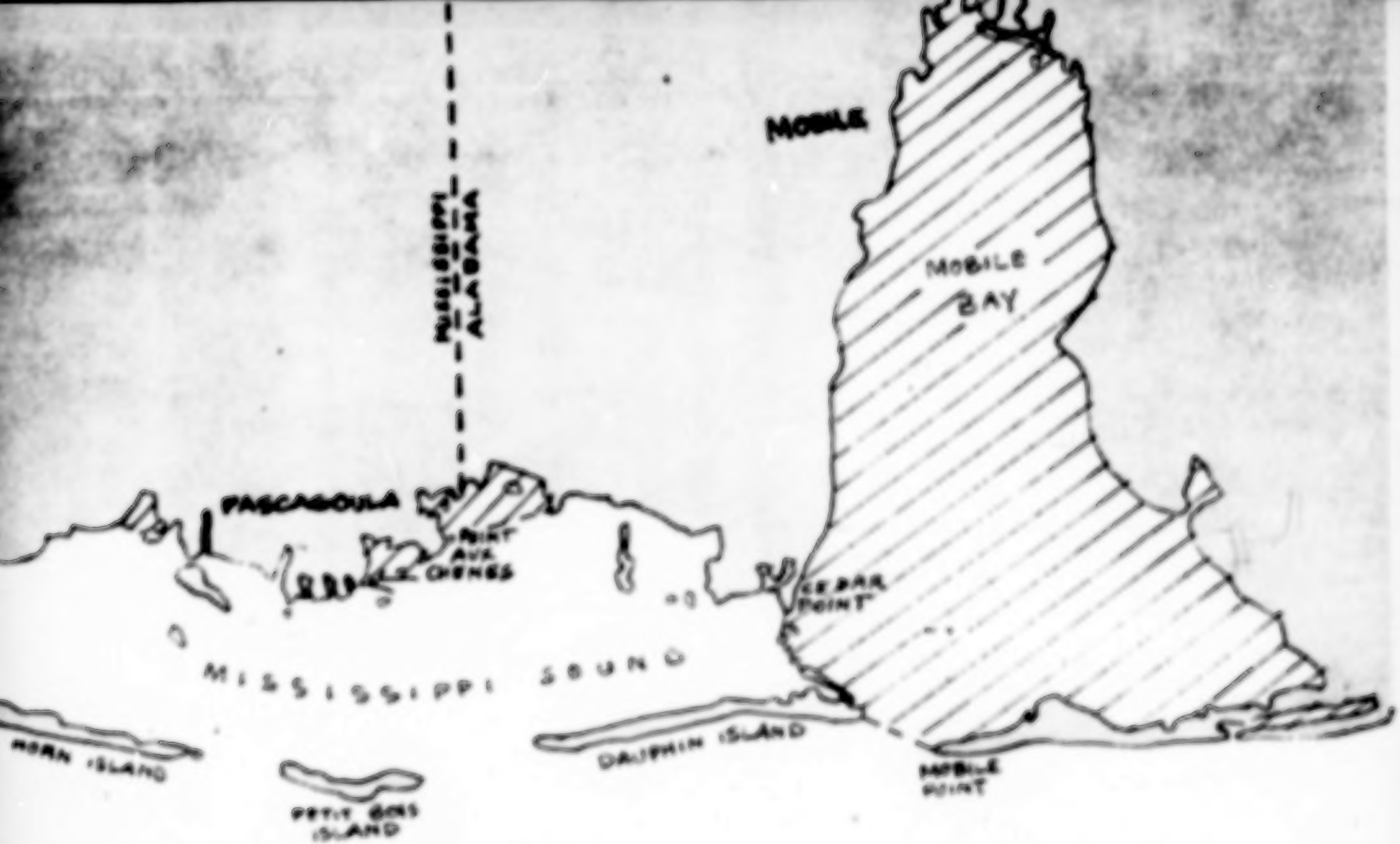


CHART 2

INLAND WATERS UNDER
BASIC UNITED STATES POSITION

2a

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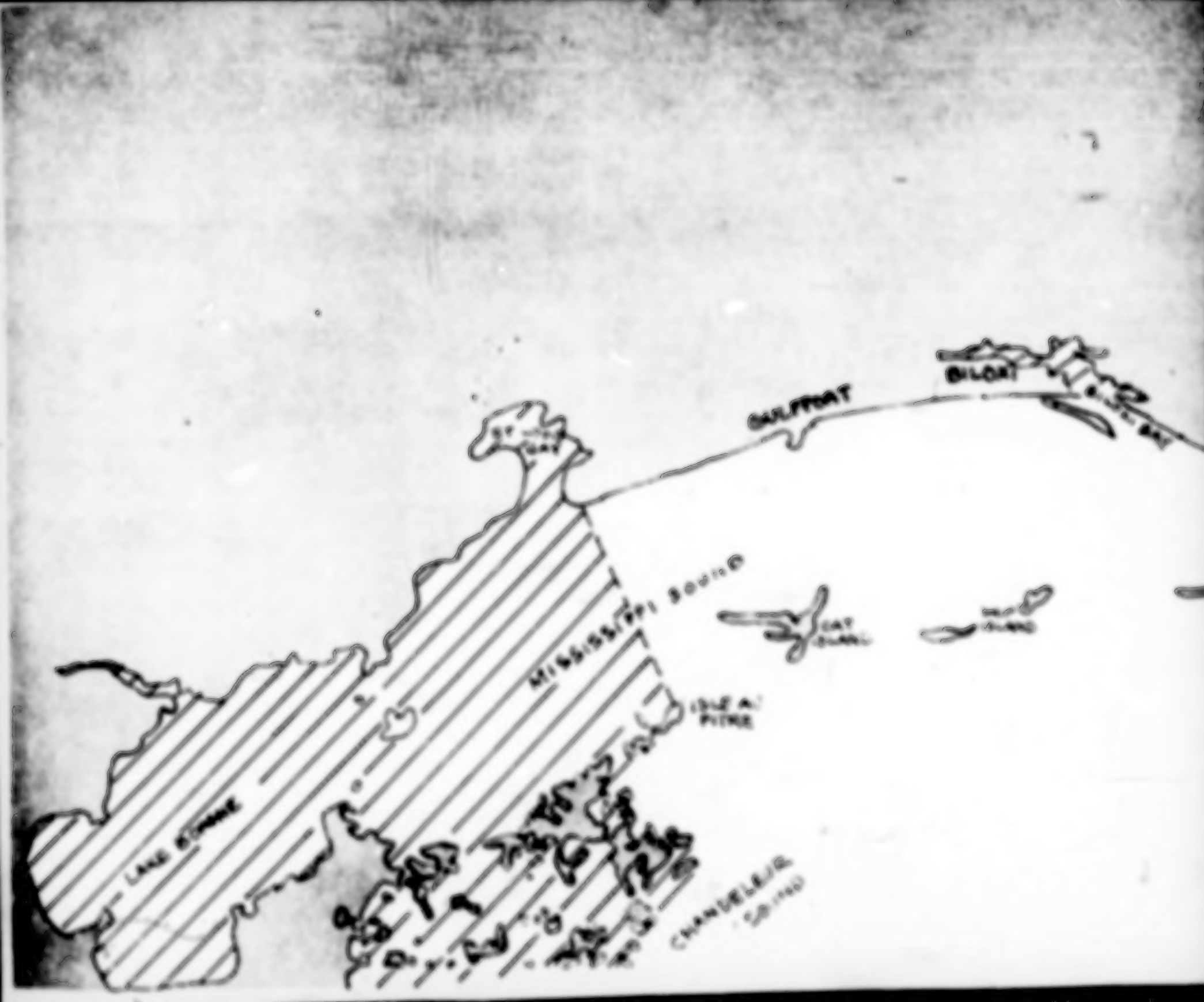

GULFPORT
BILOXI
MISSISSIPPI SOUND
LAKE BORGNE
CHANDELEUR



CHART 3

INLAND WATERS ACCORDING TO U.S.
IF DAUPHIN ISLAND IS PART OF MAINLAND

3a

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Supreme Court, U.S.
FILED
JUN 26 1984
ALEXANDER L. STEVAS
CLERK

No. 9, Original

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS,
MISSISSIPPI, ALABAMA
AND FLORIDA
(MISSISSIPPI BOUNDARY CASE)
Defendants.

EXCEPTIONS AND BRIEF OF THE STATE OF MISSISSIPPI

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No. 9, Original

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA
(MISSISSIPPI BOUNDARY CASE)
Defendants.

EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER AND BRIEF OF THE STATE OF MISSISSIPPI

INTRODUCTION

The issue in this proceeding is whether the Mississippi Sound is inland waters under the Submerged Lands Act 43 U.S.C. §1301, *et seq.* The Special Master in his Report filed April 9, 1984 found that the waters of the Sound constitute inland waters of the States of Mississippi and Alabama and that title to the underlying lands belonged to the States. In particular, the Master found the Sound qualified both as a historic bay and a juridical bay under Article 7 of the Geneva Convention on the Territorial Sea and Contiguous Zone. With these two conclusions, the State of Mississippi fully agrees.

Mississippi's exceptions to the Report relate to the alternative bases asserted in support of its claim: that Mississippi Sound qualifies as a juridical bay under Article 7 regardless of the characterization of Dauphin Island as a "mainland headland"; that Mississippi Sound qualifies as inland waters under Article 4 of the Convention on the Territorial Sea and Contiguous Zone and prior United States practice of enclosing as internal waters those waters between the mainland and offlying islands which were so closely grouped that no entrance exceeded ten nautical miles in width; and that Mississippi's southern boundary was established and approved by Congress along the southern coast of the barrier islands in the Mississippi Enabling Act (1817).

Mississippi takes these exceptions to the Special Master's Report for the sole purpose of preserving its theories which it believes further supports the Special Master's ultimate findings.

EXCEPTIONS

The State of Mississippi excepts to the following findings and conclusions in the Special Master's Report:

1. The United States has not adopted the straight baseline method authorized by Article 4 of the Convention. (Report, p. 7).

2. Judicial deference is appropriate with respect to Mississippi's Article 4 claim to the Mississippi Sound and must be judged by present United States policy respecting straight baselines. (Report, p. 7).

3. Mississippi further excepts to the Special Master's failure to find Mississippi Sound a juridical bay regardless of the treatment given to Dauphin Island as a mainland headland. (Report, p. 18).

4. The State also excepts to the Master's conclusion that he was foreclosed from finding that Mississippi's Act of Admission (1817) on its face fails to establish the State's southern boundary along the southern coast of the barrier islands. (Report, pp. 33-34).

SUMMARY OF ARGUMENT

1. Mississippi bases its straight baseline claim to Mississippi Sound as inland waters on the policies and practice of the United States. In his report the Special Master found Mississippi Sound to be a historic bay based on the fact that the United States had traditionally asserted and maintained dominion over the area with the acquiescence of foreign governments. In particular, he found that the United States had adopted a policy and practice of enclosing waters between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles as inland waters. (Report, pp. 41-44, 47-54). Such a method of drawing straight baselines to a string of offshore islands has been characterized by this Court as a "fictitious bay" concept. (*United States v. Louisiana, et al.*, 394 U.S. 11, 72, n. 96). Despite these findings, the Special Master concluded the State's claim is to be judged by present United States position and that the United States has not expressly adopted Article 4 of the Convention.

Mississippi Sound was recognized under international law as internal waters of the United States prior to the adoption of the Convention in 1961. To deny the effect of the prior policy and practice of the United States would result in a disposition of the territory of the State of Mississippi and the United States contrary to Article IV, §§3 and 4 of the Constitution of the United States.

The fact that Mississippi has asserted alternative bases in support of its inland water claim should not vitiate its claim under Article 4 of the Convention. Moreover, by relegating the State's proof of straight baselines to treatment under a historic bay analysis, the Master imposes

upon the State an additional burden of showing the continuous exercise of sovereignty and dominion, notice, and acquiescence by foreign powers. Under these circumstances, the State of Mississippi submits that deference to the United States' refusal to employ straight baselines to enclose Mississippi Sound is inappropriate and that Article 4 is an appropriate means of securing the title and territory of the State of Mississippi.

2. Mississippi asserts that Mississippi Sound qualifies as juridical inland waters under Article 7 of the Convention regardless of the treatment of Dauphin Island as an extension of the mainland. This proposition is confirmed by a careful analysis of Article 7, its *travaux preparatoires*, and opinions of this Court. From these authorities it is clear that the presence of islands along a mainland coast may have a significant influence on the intervening waters by creating natural entrance points and confirming the existence of indentations and landlocked water. Contrary to the argument of the United States that analysis under Article 7 is largely subjective, the *travaux* clearly indicates the insistence of the drafters of Article 7 upon a clear and precise method of establishing the existence of a juridical bay. By carefully applying Article 7, disputes regarding "well-marked indentations" and "land-locked" waters are reduced to empirical analyses.

3. Mississippi contended before the Master that its boundary description contained in its Enabling Act (1817) expressly and by implication establishes the State's boundary along the southern coast of the barrier islands. The State believes that the boundary calls are sufficiently precise as to leave no doubt that the Mississippi Sound was to be included within that boundary. If that be the case, the Submerged Lands Act, 43 U.S.C. §1301, *et seq.*, specifically confirms Mississippi Sound as inland waters and authorizes

an extension of its boundary up to three miles in the Gulf. At an earlier stage of this litigation, *United States v. Louisiana, et al.*, 363 U.S. 1 (1960), the United States, citing *Pollard's Lessee v. Hagan*, 3 How. 212, conceded Mississippi Sound as inland waters of the State and that the underlying lands passed to the State upon its entry into the Union. *Pollard* had recognized the States' rights to the beds of inland waters within their respective boundaries. While the Court concluded that the boundary call "including all islands within six leagues of the shore" did not purport to create a territorial sea at that distance where no islands existed, that conclusion is fully consistent with a boundary line drawn around islands where they do exist. A finding to the contrary would ignore the plain language of the boundary calls without resolving the location of the boundary. If the Enabling Act fixes no boundary except by implication, then the boundary may be established by reference to extrinsic fact (*Missouri v. Kansas*, 313 U.S. 78 (1909)), and the case remanded to the Special Master for additional findings, unless the Court finds in favor of the State on other grounds.

ARGUMENT

I. JUDICIAL DEFERENCE TO THE UNITED STATES' DISCLAIMER OF ARTICLE 4 STRAIGHT BASELINES IS INAPPROPRIATE IN THE PRESENT CASE.

The Special Master found in his Report that the United States has not adopted the straight baseline method authorized by Article 4 of the Convention on the Territorial Sea and Contiguous Zone. He concluded:

> I am therefore convinced that the adoption of the 24-mile closing line together with the semi-circle test in place of the ten mile rule represents the *present position* of the United States and that this has resulted in no contraction of the recognized territory of the states of Alabama and Mississippi for the reasons that will hereafter appear, and therefore that Article 4 of the Convention does not apply. (Report, p. 7). [Emphasis supplied].

In reaching this conclusion he explained:

> The states, however, contend that the United States has traditionally claimed as inland waters sounds and straits lying behind islands where none of the entrances between islands or islands and the mainland exceeds ten miles in width, and that this amounts to the adoption of a system of straight baselines. It is apparently true that prior to the ratification by the United States of the Geneva Convention (March 24, 1961) it adhered to the so-called 'ten mile rule' . . . . (Report, pp. 5-6).

The Special Master subsequently found in the context of Mississippi's historic bay claim:

> On March 24, 1961 the United States ratified the Geneva Convention, which as noted in *United States v. California, supra*, represented a departure from its previously held position; therefore the material quoted above represents the publicly stated position of the United States from 1903 (Alaska Boundary Arbitration) to that date. *Under that position, there is no doubt that Mississippi Sound constituted inland waters, as none of its mouths exceeds ten miles in width.* (See Stipulation No. 6). (Report, pp. 53-54). [Emphasis supplied].

The "ten-mile rule" referred to by the Special Master was recognized by several nations prior to the effective date of the Convention (September 10, 1964).[1] Under that rule waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were deemed inland waters. The rule was derived from the supposed analogy with bays and is frequently alluded to as a "fictitious bay" concept.[2]

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1. The United States ratified the Convention on March 24, 1961. The Convention, however, did not go into effect until the requisite number of nations had ratified it.

2. In *United States v. Louisiana*, 394 U.S. 11 (1969), the Court noted:

> [W]e held that the choice of whether to employ the concept of a 'fictitious bay' was that of the Federal Government alone [citation omitted]. That holding was, of course, consistent with the conclusion that the drawing of straight baselines is left to the Federal Government, for a 'fictitious bay' is merely the configuration which results from drawing straight baselines from the mainland to a string of islands along the coast. (p. 72, n. 96).

In a letter, dated June 6, 1972, Jonathan I. Charney, Chief of the Marine Resources Division, U.S. Department of Justice, replied to a request for comments on proposed lease maps for the Gulf of Mexico. The purpose of the review was to ascertain whether the maps conformed with the baseline used on the Law of the Sea Task Force Charts. He explained:

> The only place where a problem arises is found on the Mobile Leasing Map. The difference between the leasing map and the Task Force documents raises the question as to the status of Mississippi and Chandeleur Sounds. Although the State Department takes the position that Chandeleur Sound is for the most part high seas, *in the early part of our litigation with Louisiana the Department of Justice took the position that it was internal waters on the theory that it was a fictitious bay.* Although the theory was discredited by the Supreme Court in 1965, *United States v. California*, 381 U.S. 139 at 170-172, it was decided that, in the interest of comity with the State, it would be better not to change our litigation position. (Exhibit M-101). [Emphasis supplied].

The letter notes that the United States entered into a stipulation with Louisiana in 1971 that it would not claim that Chandeleur Sound was on the outer continental shelf. The letter continued:

> No such stipulation or reliance has taken place with respect to the rights of Mississippi Sound and, if pressed, I would assume that we would take the position that the limit of the states' rights is the 3-mile limit shown on the Task Force Documents. *However, due to the status of our other litigation, we believe that we should not litigate this question now.* (Exhibit M-101, p. 2). [Emphasis supplied].

While the Master clearly recognizes the treatment of areas such as Mississippi Sound under prior United States policy and practice, he declined to give effect to that policy in the matter *sub judice*. The Convention, he notes, is controlling in defining inland waters under the Submerged Lands Act, and under the Convention waters between islands or islands and the mainland become internal by application of Article 4 or the 24 mile closing line and semicircle test of Article 7. The United States, however, has disclaimed the use of straight baselines under Article 4.[3] Based on the Master's subsequent findings regarding the ten-mile rule employed by the United States, it is obvious that he intended his conclusion regarding treatment of straight baselines should be limited to the present policy of the United States.

The present policy of the United States regarding straight baselines and offshore islands did not burst forth fully developed like Athena from the head of Zeus. There was no abrupt departure from the ten-mile rule following the ratification of the Convention on March 24, 1961. The Convention was not adopted until September 10, 1964 just two months before oral argument in *United States v. California*, 381 U.S. 139 (1965). Moreover, the United States did not seek to be relieved from its concession regarding Louisiana's offshore islands until *United States v. Louisiana*, 394 U.S. 11 (1969), and even then it declined to withdraw its concession regarding Chandeleur Sound. During that litigation it asserted Mississippi Sound was inland waters, and not until April 1971 did the United States make

3. The fact that the United States may have used the terms "ten-mile rule" and "fictitious bay" rather than "straight baselines" is of little significance. The simple fact remains that the method employed by the United States was recognized as a system of straight baselines under international law following the decision in the *Fisheries Case*, I.C.J. 1951.

its first public disclaimer in regard to Mississippi Sound, more than ten years after the Convention. A further review of the positions of the United States before this Court is reflective of the gradual change in policy.

The Court's adoption of the Geneva Convention for defining the term "inland waters" as used in the Submerged Lands Act together with the deference accorded the United States' position provided the incentive for the Executive Branch eventually to abandon the ten-mile rule. In *United States v. California*, *supra*, the United States contended that the definition of the term "inland waters" should be governed by the policy of the United States on May 22, 1953, the date of the enactment for the Submerged Lands Act. Similarly, the United States argued that California could not rely upon the straight baseline method to extend its territorial boundaries beyond their traditional limits. The Court stated:

> . . . California may not use such baselines to extend our international boundaries beyond their traditional limits against the expressed opposition of the United States. The national responsibility for conducting our international relations must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. But an extension of state sovereignty to an international area by claiming it as inland waters would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent states from so enlarging themselves. (p. 168). [Emphasis supplied].

There is no indication in the opinion of this Court that the United States had receded from its use of the ten-mile rule for enclosing nearby islands. To the contrary, the United States noted in its Brief as follows:

> California attempts to analogize the Santa Barbara Channel to Chandeleur and Breton Sounds, in Louisiana, which the United States has recognized as inland waters. For present purposes, it is enough to observe that the widest entrances to Chandeleur and Breton Sounds are six miles between Ship Island and the northernmost tip of the Chandeleur Islands. Thus, *our concession as to Chandeleur and Breton Sounds involved no breach of the ten-mile limit.* (Brief of the United States, p. 113). [Emphasis supplied].

The Court further noted that the openings at the ends of Santa Barbara Channel were 11 miles and 21 miles, clearly in excess of the ten-mile rule. The United States contrasted Santa Barbara Channel with Chandeleur Sound as a "strait which serves as a useful route of communication between two areas of open sea." That, of course, was a limitation on the application of the ten-mile rule for straits and sounds. Those which gave access only to an inland sea as opposed to connecting two areas of the high seas are treated as internal waters provided none of their entrances exceeded ten miles. (See Letter of Acting Secretary of State James E. Webb, Paragraph (f), dated November 13, 1951, Exhibit J-106). The Court concluded: "The United States has not in the past claimed the Santa Barbara Channel as inland waters and opposes any such claim now." (p. 172).

Four years later in *United States v. Louisiana*, 394 U.S. 11 (1969), the United States seizing upon the deference accorded in the California case asserted that straits and

sounds formed in part by offshore islands constitute inland waters under the Convention only by drawing straight baselines. The decision it maintained rests in the sole discretion of the Federal Government and that it has not adopted that option. That disclaimer it asserted was conclusive of the matter under the California decision. (381 U.S. 1, at pp. 67 and 72).

The Court in its discussion of Article 4 noted:

> This latter area [Chandeleur and Breton Sounds] is not in dispute for the United States, while asserting that the sounds are not necessarily inland waters under the Convention, has conceded that they belong to Louisiana. That concession was made at an early stage of this litigation . . . and the United States has decided not to withdraw it despite the subsequent ratification of the Convention. (394 U.S. 1, 66).

While declining to bind the United States by its previous concession that the areas between the Louisiana mainland and all its offshore islands were "sufficiently enclosed to constitute inland waters," (363 U.S. 1, p. 68, n. 108), the Court indicated that the Federal Government's discretion under Article 4 of the Convention was not absolute. In that regard, the Court stated:

> It might be argued that the United States' concession [that Chandeleur Sound was inland water of the State of Louisiana] reflected its firm and continuing policy to enclose inland waters within island fringes. It is not contended at this time, however, that the United States has taken that posture in its international relations to such an extent that it could be said to have, in effect, utilized the straight baseline approach sanctioned by Article 4 of the convention. *If that had been the consistent official international stance*

> *of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana.* (p. 72, n. 97). [Emphasis supplied].

The Court expressly left open the circumstances under which the Federal Government's refusal to employ straight baselines might be questioned:

> We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States has actually drawn its international boundaries in accordance with the principles and methods embodies in Article 4 of the Convention on the Territorial Sea and Contiguous Zone. (p. 74).

In this context the Court stated:

> The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in United States v. California, it would be inequitable in adopting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events. (p. 77).

It further admonished:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of *adding* to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic law suit. The latter, we believe would approach an impermissible contraction of territory against which we cautioned in United States v. California. (p. 77). [Emphasis supplied].

The Court in these cases has identified certain closely related factors to be considered in determining the appropriateness of judicial deference for Article 4 claims. These considerations include: Whether adoption of straight baselines would extend the international boundaries of the United States beyond their traditional limits; whether adoption of a straight baseline method would be truly novel; and whether failure to employ straight baselines would result in a contraction of a State's recognized territory.

Mississippi contends that judicial deference to the United States' disclaimer that it has not employed straight baselines is inappropriate in the context of Mississippi Sound. In view of the Master's subsequent findings, it is clear that the United States employed the ten-mile rule for certain straits and sounds, that such method of delimiting inland waters was consistent with international law stated in the *Fisheries Case*, I.C.J. 1951, and that the water areas so enclosed became the territory of the United States and the State of Mississippi protected by Article IV, Sections 3 and 4 of the Constitution of the United States. Thus, the use of straight baselines along the Mississippi barrier islands is neither novel with the Federal Government nor would it enlarge the traditional international boundaries of the United States. Likewise, it may well result in a contraction of the State's recognized territory. Moreover, the United States relying upon the ten-mile rule conceded Mississippi Sound to be inland waters over a quarter century ago and did not publicly recede from that position until 1971, some ten years after

the ratification of the Convention. Even at that stage, the United States did not inform the State of Mississippi of any disclaimer. To the contrary, the United States appears to have discouraged the publication of any charts which might disclose the change in policy respecting the Sound. (Exhibit M-101). Not until the publication of the OCS Protraction Diagram in 1977 depicting the enclaves of high seas within Mississippi Sound did the State of Mississippi become aware of the policy change by the Federal Government. The Special Master concluded that the attempt by the United States to rescind its concession as to Mississippi Sound as inland waters was suspect. He found:

> . . . [U]nder the circumstances it is difficult to accept the disclaimer as entirely extrajudicial in its motivation. It would appear to be more in the nature of an attempt by the United States to prevent recognition of any preexisting historic title which might have already ripened because of past events but which was called into question for the first time in a domestic lawsuit. (Report, p. 47).

The Special Master accepted the United States' disclaimer and deferred to its position that Article 4 did not apply. It is significant that the Master's deference to the discretion of the Federal Government was in part predicated upon his finding that:

> . . . this has resulted in no contraction of the recognized territory of the States of Alabama and Mississippi *for reasons that will hereafter* appear . . . . (Report, p. 7). [Emphasis supplied].

That conclusion is most perplexing. The Special Master, in effect, concludes Article 4 should not be applied because no contraction of Mississippi's territory has occurred

but because of his subsequent findings that Mississippi Sound is a juridical bay under Article 7 and constitutes a historic bay under applicable principles of international law. However, the fact that Mississippi has asserted alternative bases in support of its inland water claim should not vitiate its claim under Article 4 of the Convention nor should it dissuade the Master from making findings on each alternative theory.

For the foregoing reasons, Mississippi submits that judicial deference to the Federal Government's refusal to employ Article 4 straight baselines to enclose Mississippi Sound as inland waters is inappropriate and that Article 4 is a proper means of preserving the title and territory of a State.

II. MISSISSIPPI SOUND QUALIFIES AS INLAND WATERS REGARDLESS OF THE TREATMENT OF DAUPHIN ISLAND AS A MAINLAND HEADLAND.

In his Report, the Special Master concluded that Mississippi Sound qualifies as a juridical bay within the meaning of Article 7 of the Convention on the Territorial Sea and Contiguous Zone. His conclusion was premised upon the findings that Isle au Pitre, Louisiana and Dauphin Island, Alabama are extentions of the mainland forming western and eastern headlands to the Sound. With respect to Mississippi's alternative theory, the Master noted:

> The states contend that even if Dauphin Island is not considered a part of the mainland, then the eastern natural entrance point of Mississippi Sound is Cedar Point, and therefore the total closing line distance is still less than 24 nautical miles (Stipulation Nos. 1 and 7) . . . . In view of my finding as to Dauphin Island, it is unnecessary for me to pass upon that

contention. Suffice it to say that in my judgment, Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and Cedar Point. (Report, p. 18, n. 7).

While Mississippi agrees with the Master's findings regarding Isle au Pitre and Dauphin Island, it believes the same conclusion may be demonstrated by a straight forward application of the provisions of Article 7 without regard to the treatment of Dauphin Island as an extension of the mainland.

The United States, eschewing the empirical assistance provided by Article 7 in favor of subjective characterization, insists Mississippi Sound is not a "well-marked" indentation at all but merely a fringe of islands along a relatively straight mainland coast.[4]

Mississippi, however, contends that the language of Article 7 provides an objective meaning for the terms

4. The difficulty with subjective opinion is apparent. For example, in its brief in *U.S. v. Louisiana* (1969), the United States distinguished the treatment of Mississippi Sound as inland waters from the island configurations along the Louisiana coast by characterizing the Mississippi barrier islands as "islands in the mouth of an indentation." The United States argued: "Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation—an entirely different matter. Mississippi Sound, referred to by Louisiana, is such a situation." (Exhibit J-66, p. 30). In the present case the United States has abandoned its earlier conclusion and now denies that Mississippi Sound constitutes an indentation at all. Dr. Bowett, who testified on behalf of the United States, asserted that the distinction between an "indentation" and a "mere curvature" in Article 7(2) is a matter of subjective judgment upon which individuals would be likely to have a difference of opinion. (TR. 1850, ll. 20-25). However, even Dr. Alexander, Geographer for the State Department, conceded that the Sound is a well-marked indentation if the entirety of the Sound is considered rather than isolated segments. (TR. 2242). Professor Reisman, on behalf of Mississippi, testified that the area constituted a pronounced indentation to which Article 7 applied. (TR. 2043).

"indentation" and "land-locked waters," and that its meaning is confirmed by the *travaux preparatoires*, the writings of publicists, and the opinions of this Court.

Article 7 provides *inter alia*:

> 1. This article relates only to bays the coasts of which belong to a single State.
>
> 2. For purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
>
> 3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points.

The language of Article 7(2) originated in the proposal of Garcia Amador, the Cuban representative at the 317th Meeting of the Seventh Session of the International Law Commission in 1955. Paragraph 1 of his proposed text provided:

> For purposes of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. (Y.B. ILC, 1955, Vol. I, p. 206).

His definition of "bay" was inspired by the conclusions which the United Kingdom had submitted in *United King-*

dom v. Norway, ICJ (1951).[5] He modified the British submission by including the words "as to contain landlocked waters"—an idea taken from the dissenting opinion of Justice McNair in the same case.

A. The Semi-Circle Test.

Amador's proposal for Article 7(2) occasioned concern among several members of the International Law Commission respecting the indefinite and imprecise choice of language. Professor J.P.A. François, Special Rapporteur for the ILC's work on the Regime of the Territorial Sea, contrasted the objective criteria of his draft of Article 7 with the geographical factors of Mr. Amador's proposal. The Rapporteur observed:

> The latter [Amador's proposal] provided a definition which, when applied, might be found to be a petitio principii. Moreover, the expression 'landlocked waters,' even in the sense ascribed to it by the International Court of Justice in the Fisheries Case, was imprecise. (Y.B. ILC, 1955, Vol. I, p. 207).

Likewise, Mr. Sandstrom, the Swedish representative, voiced a similar criticism of Paragraph 1 of the Amador proposal. He pointed out that it was difficult to formulate a juridical definition based on geographical factors and that he considered the definition of Paragraph 1 of Mr. Amador's text to be, if not a petitio principii, at any event extremely vague. (Y.B. ILC, 1955, Vol. I, p. 209). The representative of the United Kingdom, Sir Gerald Fitz-

5. The conclusion of the United Kingdom stated:

> The definition of a bay in international law is a well-marked indentation whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast. (ICJ Reports, 1951, p. 122).

maurice, noted that while Amador's definition of a bay contained a good general description possibly helpful to laymen, it did not provide a precise definition. He accordingly proposed that the definition of a bay be clarified by adding the following sentence:

> An indentation shall not, however, be regarded as a bay unless its area is as large or larger than the semi-circle drawn on the entrance of that indentation. (Y.B. ILC, 1955, Vol. I, p. 210).

That amendment supplied an objective content to the definition by providing a technical means of verifying the existence of a bay. The amendment together with the definition proposed by Amador was adopted by the Commission (ILC), approved by the Law of the Sea Conference (LOS), and subsequently incorporated as a part of Article 7(2) of the Convention. (Y.B. ILC, 1955, Vol. I, p. 211; U.N. Conf. LOS, 1958, Vol. II, pp. 268-69).

The ILC was created by the United Nations General Assembly to study and encourage the "progressive development of international law and its eventual codification." The term "Codification of International Law" referred to "the more precise formulation and systemization of the rules of international law in fields where extensive state practice, precedent and doctrine already existed." (See Strohl, *International Law of Bays*, p. 214). In this context, Mr. Amador's draft was an appropriate definition in that it adopted the authoritative language of the International Court of Justice in the *Fisheries Case*. The ILC beginning with that language formulated precise technical terms embodying the subjective geographical criteria for a bay. Properly viewed, the definition of a bay under Article 7(2) employs the "semi-circle test" and the related concept of "natural entrance points" to give content and

meaning to the vague and imprecise geographical terms upon which Amador's proposal relied.

The semi-circle test was not entirely new. At the suggestion of the Special Rapporteur a committee of experts met at the Hague in 1953 to examine questions of a technical nature raised during the Commission's meeting of the previous year. In its report, the committee of experts addressed the following questions:

> Accepting the low-water line system as a general rule for measuring the territorial sea, while in bays a straight line across the bay should circumscribe the 'inland waters.' What territorial observations can be made to:
>
> A. *the definition of a bay as opposed to a mere curvature* in the coastline?
>
> • • •
>
> (U.N. Document A/CN. 4/61/Add. 1). [Emphasis supplied].

In response to the question posed, the Committee stated:

> A. (1) A bay is a bay in the juridical sense, if its area is as large as, or larger than that of a semi-circle drawn on the entrance of that bay. Historical bays are excepted; they should be indicated as such on the maps.
>
> A. (2) If a bay has more than one entrance . . . this semi-circle should be drawn on a line as long as the sum-total of the length of the different entrances.
>
> A. (3) Islands within a bay should be included as if they were a part of the waters of the bay.

The Committee and the Special Rapporteur, who incorporated the report in his 1954 draft of Article 7, thus

understood the semi-circle test as a technical method of distinguishing a bay from a "mere curvature of the coastline." It was, of course, with this understanding that Mr. Fitzmaurice made his amendment to Paragraph 1 of Mr. Amador's text.

Further evidence of the significance of the semi-circle test is provided by the 1958 United Nations Law of the Sea Conference (LOS). The ILC draft of Article 7 was referred to the First Committee of the Conference. During consideration of the draft convention, the United States proposed an amendment to Article 7(1). The amendment together with the United States' comment further confirm the function to the semi-circle test. The amendment provided:

> For purposes of these Articles a bay is a well-marked coastal indentation with an area at least equal to that of a semi-circle whose diameter is a line drawn across the mouth of the indentation; this is the closing line of the bay and constitutes the baseline. (U.N. Conf. LOS, Vol. III, p. 241).

In its accompanying comments, the United States stated:

> The words *'contain land-locked waters and constitute more than a mere curvature of the coast'* in the first sentence of the draft article *lack legal precision and are unnecessary in view of the requirement relating to the area of a semi-circle.* (U.N. Conf. LOS, 1958, Vol. III, pp. 241-42). [Emphasis supplied].

The gloss given by the United States reflects the general understanding that if a body of water meets the semi-circle test it will constitute more than a "mere curvature" and enclose landlocked waters.

Robert Hodgson and Lewis Alexander, the former and incumbent Geographers for the State Department, state in reference to the phrase "well-marked indentation" as follows:

> A minimum objective test of the status is essential and is furnished with the Convention's semi-circular rule *which determines the point*. (*Toward an Objective Analysis of Special Circumstances*, p. 4, Exhibit J-5). [Emphasis supplied].

They further state:

> The concept of land-locked [waters] is imprecise and as a result, may call for subjective judgments. The semi-circular test. . . may relate also to the character of the waters being land-locked as well as to the determination of a well-marked indentation. (Exhibit J-5, p. 6).

Derek Bowett, who testified on behalf of the United States on the application of Article 7, stated that the semi-circle test was intended to verify the existence of a "well-marked indentation" as opposed to a "mere curvature" of the coastline.[6] (TR. pp. 1826, 1857). His testimony in this respect is consistent with the *travaux* and general understanding of the function of the semi-circle test.

The Special Master in his Report concluded that Mississippi Sound met the semi-circle and the 24-mile closing line tests. He found that there was little applicable authority to assist him in determining whether in the language of Article 7(2) Mississippi Sound constituted a "well-marked indentation whose penetration is in such

6. Derek Bowett is Professor of International Law at Cambridge University and author of *The Legal Regime of Islands in International Law*.

proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast." (Report, p. 19).

Mississippi argued that inasmuch as the Sound met the semi-circle test[7] based on the total length of the closing lines connecting its natural entrance points, it fulfilled the requirements of a juridical bay. In rejecting the State's argument, the Master in a somewhat perplexing passage stated:

> The Court appears to have settled this point in *United States v. Louisiana*, *supra*, where it says:
>
> > We cannot accept Louisiana's argument that an indentation which satisfies the semi-circle test ipso-facto qualifies as a bay under the Convention. Such a construction would fly in the face of Article 7(2), which plainly treats the semicircle test as a minimum requirement. And we have found nothing in the history of the Convention which would support so awkward a construction. 394 U.S. at p. 54. (Report, p. 19).

The Master observed that in that circumstance and with little authority to assist him in adjudicating the questions, he was constrained to rely largely upon subjective criteria. (Report, pp. 19-20). The dilemma appears to result from an overly broad reading of the above quoted passage from this Court's opinion out of its proper context.

One of the areas in dispute in *United States v. Louisiana*, 394 U.S. 11 (1969), was East Bay, a V-shaped bay

7. Application of the semi-circle test subsumes the existence of natural entrance points for identifying the area of the indentation under Article 7(3). See discussion of natural entrance points, *infra*.

in the Mississippi River delta. Initially the Court pointed out:

> Since East Bay does not meet the semicircle test on a closing line between its seawardmost headlands . . . it does not qualify as a bay under Article 7 of the Convention on the Territorial Sea and Contiguous Zone.

It was noted, however, that a line could be drawn within East Bay which would satisfy the semi-circle test. Louisiana argued by analogy that just as under Article 7(5) a 24-mile line can be drawn within a bay whose mouth is more than 24 miles wide so could a closing line be drawn within an indentation whose mouth was too wide at its seawardmost headlands so as to enclose the greatest possible area. The United States objected to the closing line selected by Louisiana. It argued that the area which Louisiana sought to enclose within East Bay did not constitute a bay because there was no "well-marked indentation" with identifiable headlands enclosing "landlocked waters". The United States further argued that there was not the slightest curvature of the coast at either asserted entrance point selected by Louisiana.

The Court stated:

> We do not now decide whether the designated portion of East Bay meets these criteria, but hold only that they must be met. (*United States* v. *Louisiana*, *supra*, p. 54).

Thus the conclusion of the Court appears to have been *obiter dictum* intended for the guidance of the Special Master in subsequent proceedings.

Properly understood, the Court's comments related not to the effect of the semi-circle test, *per se*, but rather to the proper selection of "natural entrance points". Only by

the identification of natural entrance points is it possible to apply the semi-circle test. The indentation to be compared to the semi-circle is defined in terms of the line connecting the natural entrance points and the low-water mark around the shore of the indentation. Thus, if natural entrance points are established which meet the semi-circle test, the *travaux preparatoires* to Article 7 indicates that the area should be considered a bay. This is not to suggest that a closing line for a bay may be drawn without regard to the location or existence of natural entrance points, for so awkward a construction would be clearly at variance with the precise language of Article 7(3).

The State of Mississippi submits that the language relied upon by the Special Master requires careful analysis in terms of "natural entrance points". When this is done, it is apparent that Mississippi's interpretation of the function of the semi-circle test is in full accord with this Court's comments regarding East Bay. Moreover, Louisiana was unable to direct the Court's attention to anything in the Convention supporting its strained argument. Mississippi, on the other hand, relies upon the plain language of Article 7 and replete references to the history of the Convention. The touchstone for understanding the terms "well-marked indentation," "mere curvature," and "landlocked waters" is the concept of "natural entrance points" in conjunction with the semi-circle test. In this context, the semi-circle test provides technical verification of the vague and imprecise geographic conditions described in Article 7(2).

The correctness of Mississippi's construction of Article 7 is confirmed not only by the plain language and history of the Convention, but by the absurd consequences which would otherwise result. The Special Master, believing himself foreclosed from a simpler and more precise analy-

sis, viewed Article 7(2) as establishing separate subjective requirements different from the assistance provided by the semi-circle test. His approach ignores the repeated insistence of the drafters of the Convention for giving precision to the definition of "bay" by providing a technical formula for verifying the existence of a bay. The travaux preparatoires discussed earlier makes clear the semi-circle test was intended to establish the proportion between a bay's penetration and width of the mouth. The semi-circle test provides a mathematical relation between the width of the mouth of an indentation and area of the indentation. If this relation is met, the bay is landlocked; if not, it is a "mere curvature" and part of the open sea.

The Master having determined the Sound met the semi-circle test (Stipulation No. 9) proceeded to calculate a ratio of depth of penetration to width of the closing line. Based upon that ratio (.4167:1) he subjectively concluded Mississippi Sound constituted more than a "mere curvature" of the coastline. (Report, pp. 9-20).

In an attempt to give content to the term "landlocked," the Special Master found the ratio of the combined lengths of the barrier islands exceeded 50% of the length of the bay and was therefore sufficient to enclose landlocked waters.

Quite apart from the fact that the Master's construction of Article 7 required him to calculate at least three separate mathematical ratios, it relegates the semi-circle test to added baggage within the Convention with no apparent purpose but to impose another restriction. Mississippi agrees with the Master's ultimate conclusions, but it submits that his interpretation of the requirements of Article 7 are unduly complicated, ignoring the admonitions of the drafters of the Convention and the travaux.

B. Natural Entrance Points.

The terms "well-marked indentation" and "landlocked waters" are implicitly tied to the concept of "natural entrance points" employed in Article 7. Article 7(3) of the Convention provides:

> For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of the natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

The concept of a "juridical bay" is a *lex specialis*, a special law defining the term for specific purposes. Article 7(2) begins by stating: "For the purposes of these articles, a bay is . . . ." It directs our attention to the specialized meaning given to the term "bay" set forth in the text, and indirectly to cautions against relying on any preconceived notions which have not been included in Article 7.

The Convention in its choice of language quite explicitly departs from the concept of mainland headlands, replacing it with the more functional "natural entrance points". In doing so, the Convention reflects a clear rejection of the idea that there is a single geographic configuration for a bay.

In his treatise on bays, Commander Strohl states in reference to the term "natural entrance points":

> In the history of the law of bays and its codification, this is a new term . . . it was used in the opinion in

United Kingdom v. Norway. Other and older terms which have been used are mouth of the bay, headlands, or inter fauces terrae (sometimes called inter faucer terrarum). (*International Law of Bays* (1963), pp. 68-69).[8]

Section 2 of Amador's text for Article 7 submitted to the Seventh Session of the ILC in 1955 provided:

> The closing line of a bay shall be drawn between the natural geographic entrance points where the indentation ceases to have the configuration of a bay. (Y.B. ILC, 1955, Vol. I, p. 206).

As the Commission reports indicate, the concept of "natural geographic entrance points" was also taken from the United Kingdom's conclusions in the *Anglo-Norwegian Fisheries Case*. The Commission observed:

> That definition [of natural geographic entrance points] had been implicitly recognized by the International Court of Justice and tallied with historical tradition, which considered the waters of a bay as being those which were enclosed within the line *inter fauces terrarum*. (Y.B. ILC, 1955, Vol. I, p. 207).

The International Court of Justice in its opinion had recognized that waters between islands or islands and the mainland lay "inter fauces terrarum". (ICJ Reports, p. 130). The basic issue before the Court was whether the closing

8. In an accompanying note to the text, Strohl discourages equating "natural entrance points" with "headlands". In this context he states:

> Its name [headlands] is applied to a particular doctrine or school of thought on bays, Chs. 4 and 5 below. For purposes of present usage, the term 'headland' is not satisfactory since to the mariner it connotes a precipitous cape or promontory. (*The International Law of Bays* (1963), p. 69).

lines between islands or islands and the mainland should be limited by a ten mile rule for bays and whether the water areas should be sufficiently enclosed as to contain landlocked waters.

In its Reply Brief, the United Kingdom explained its position regarding the effects of islands:

> The evidence [of State practice] also points to a general recognition of the fact that coastal islands, particularly islands at the mouth of an indentation, may, by their particular position and configuration in relation to the coast, actually enclose areas of sea within the frontiers of the coastal state. In the latter case the enclosed waters are regarded as in effect a *bay, the arms of which instead of being a solid line of land are a broker. line of islands*. . . . That is a very different principle from recognition of sovereignty of an archipelago regardless of whether the sea can properly be said to be enclosed by the configuration of the islands. (*Pleading, Oral Arguments, Documents, Fisheries Case (United Kingdom v. Norway)*, Vol. II, Para. 349, pp. 545-46). [Emphasis supplied].

The United Kingdom's position is clear recognition of the influence of islands in establishing the existence of a bay. The reference to "natural geographic entrance points" in Paragraph (7) of the British conclusions was deemed equally applicable to islands as to the mainland.

After the International Law Commission's draft of Article 7 was referred to the First Committee of the United Nations Conference on the Law of the Sea, the United Kingdom submitted a proposed amendment, which the Conference report indicates supplied more precise technical terms for the draft version. (U.N. Conf. LOS, *Official Records*, 1958, Vol. III, pp. 145, 227-28). One of

the amendments was adopted as Article 7(3) of the Convention. It provided in part:

> For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points.

The amendment was intended to amplify the meaning of Article 7(2) by defining an indentation in terms of the area it occupies for comparison under the semi-circle test. Prior to the amendment, nothing in Article 7 precisely and expressly identified the extent of the indentation.

Article 7(3) defines the area of an indentation as the waters enclosed between the low-water mark around the shore of the indentation and a line joining the "natural entrance points". The line connecting these natural entrance points forms the "mouth" or entrance to the indentation. Where islands create multiple mouths, the lines joining the natural entrance points are added together for making the computations for the semi-circle test. Article 7, therefore, quite implicitly recognizes the fact that natural entrance points may be located on islands.

In this respect, this Court in *United States v. Louisiana, et al.*, 394 U.S. 11 (1969), held:

> There is no suggestion in the Convention that a mouth caused by islands is to be located in a manner any different from a mouth between points on the mainland—that is by 'a line joining the low-water marks of its natural entrance points.'

The Court further observed:

> Article 7(3) clearly distinguishes between islands which, by creating multiple mouths, form a part of the perimeter of the bay, and those which, by their presence wholly 'within' the bay, are treated as a part of its waters. (p. 60).

Article 7(3) provides the basic definition of an indentation necessary for determining whether the waters are landlocked and well-marked. The term "well-marked" in Article 7(2) refers to indentations, the mouths or entrances of which are discernable or identifiable, a point of obvious importance to mariners and cartographers in the absence of authoritative charts. The Special Master concluded that a "well-marked indentation" is one which has clearly distinguishable "natural entrance points". Professor Bowett conceded that natural entrance points assist in determining whether an indentation is "well-marked" by defining where it starts and stops. (TR. 1863). Islands which provide more than one mouth or entrance to an enclosed body of water and therefore multiple natural entrance points may serve to "well-mark" the indentation. The semi-circle test further confirms the "well-marked" character of the waters and establishes their landlocked character.

The United Kingdom argues that islands are taken into consideration under Article 7 only for purposes of measurement of the semi-circle test and the length of the closing line, and then only where islands are deemed to lay in the mouth of a pre-existing bay.

This Court has previously rejected such a construction of Article 7. In *United States v. Louisiana, supra*, the Court stated:

> While the only stated relevance of such islands is to the semi-circle test, it is clear that lines across the various mouths are to be baselines for all purposes. (p. 55).

Similarly, while the area of an indentation is defined for the stated purpose of comparison under the semi-circle test, it is patent that the term "area" so defined also applies to the "indentation" referred to in Article 7(2). The precise language of Article 7(3) is especially pertinent to the inquiry. That section provides:

> Where because of the presence of islands, *an indentation has more than one mouth*. . . . [Emphasis supplied].

The language makes it patently clear that an island which forms the mouth to an indentation cannot be considered to be "in" the mouth of a bay.

C. Coasts of Islands.

The United States argues that despite the language of the Convention and its *travaux* islands may not be taken into consideration in delimiting the area of an indentation under Article 7(3) unless the mainland without regard to the islands would qualify as a bay. Under this interpretation, the only effect of islands would be to reduce the width of the bay for purposes of the 24-mile closing line.

Article 7, it is asserted, defines bays as indentations in the "coast," a term contrasted with "islands". Mississippi contends that nothing in the Convention or Article 7 in particular supports the Government's position. To the contrary, it submits that the language of the Convention, its *travaux*, and the construction given it by the United States confirms its position.

The United States concedes as it must that islands have their own baselines and territorial sea measured in

the same manner as that of the mainland. (s.b. Article 10 and Article 3). An island it is said may therefore have its own bays. (See *Brief of United States*, p. 61 in *United States v. Louisiana*, 394 U.S. 11). Nevertheless, the Government now takes the position that the terms "coast" and "island" are somehow antithetical. The inconsistency of the United States' position is apparent. On the one hand it asserts that bays are indentations within the mainland and that islands may not be considered in establishing the requirements of Article 7(2) unless they are considered extensions of the mainland. On the other, it recognizes that islands may have their own bays, *i.e.* that bays may be formed by islands.

Article 10 directs that the baseline of an island shall be drawn in accordance with the provisions of the Convention. By reference, Article 3 defines the baseline of an island as the "low-water mark along the coast."

In this context there is no contradiction between the terms "coast" and "islands". The term "coast" is a geographical term applicable to both islands and the mainland. It represents the line of contact between the land and a body of water. The Convention and its *travaux* make clear beyond doubt that "coast" was not to be contrasted with "islands".

Article 1 of the Convention provides:

> The sovereignty of a state extends beyond its land territory and internal waters to a belt of sea adjacent to its coast, described as the territorial sea.

Article 3 further states:

> Except where otherwise provided in these articles, the normal baseline for measuring the territorial sea is the low-water line along the coast as marked on

large-scale charts officially recognized by the coastal state.[9] [Emphasis supplied].

At the Forty-fifth meeting of the First Committee of the United Nations Law of the Sea Conference held on April 12, 1958, Sir Gerald Fitzmaurice introduced the United Kingdom's amendment to the ILC's text for Article 4 (subsequently Article 3 of the Convention). The amendment substituted the phrase "articles 5 and 7" for "article 5 and to the provisions regarding bays and islands" in the ILC draft. He explained the amendment by stating that while islands were mentioned in Article 10, that article did not provide for a delimitation of the territorial sea of an island which was in any way different from that applied in the mainland. (U.N. Conf. LOS, 1958, Vol. III, pp. 139 and 227).[10]

During the same session the United States also introduced an amendment to draft Article 4 for the stated purpose of "improving the drafting of the article." (U.N. Conf. LOS, 1958, Vol. III, p. 140). The amendment changed the heading and text to read as follows:

Mainland baseline

Article 4

Subject to the provisions of the present rules, *the baseline is the low-tide line on the mainland*. The

9. Article 4 (Normal baselines) of the draft convention prepared by the International Law Commission (ILC) provided: "Subject to the provisions of Article 5 [straight baselines] and to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast. . . ." (Y.B. ILC, 1956, Vol. II, p. 257).

10. The ILC text for Article 10 (Islands) provided: "Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above the high water mark." (Y.B. ILC, 1956, Vol. II, p. 270).

baseline shall be marked on large-scale charts officially recognized by the coastal state. [Emphasis supplied].

In the accompanying commentary to its proposed amendment, the United States stated:

(b) The title 'mainland baseline' is suggested because this is the proper scope of the article. Baselines on islands and drying rocks and shoals are covered in articles 10 and 11.

• • •

(f) The word 'coast' in the second clause is undesirable, since the term was *interpreted to include islands and drying rocks and shoals by the International Court of Justice in the Fisheries Case* (Judgment of 18 December 1951, I.C.J. Reports, 1951, p. 127). *Such a construction would give an unintentionally wide scope to the draft article.* (U.N. Conf. LOS, 1958, Vol. III, p. 236). [Emphasis supplied].

It is significant that Article 10 (Islands) referred to in the amendment did not mention any method for determining the territorial sea aside from Article 4 which provided that the "baseline of the territorial sea was to be measured from the low-water line along the coast."[11]

11. In its discussion of low-tide elevations (Article 11) in its Brief in *United States v. Louisiana*, 394 U.S. 11 (1969), the United States based its argument in part upon this very proposed amendment for Article 4 and the comments. It stated:

> Thus, on March 29 the United States explained at some length that it considered 'Mainland baseline' to be the best caption to indicate that Article 4 did not include water crossings or *island baselines*. (Brief of the United States, p. 8). [Emphasis supplied].

However, the United States fails to indicate that the amendment was rejected by the drafting committee. Likewise, it fails to

(Continued on following page)

The Yugoslavian representative, Mr. Katicic, took issue with the American proposal pointing out that it involved a point of substance insofar as it referred to "the low-tide on the mainland" and that it made no reference to islands, whereas the ILC's draft referred to "the coast," thereby covering both mainland and islands. (U.N. Conf. LOS, 1958, Vol. III, p. 140).

Further consideration of Article 4 was postponed until the Fifty-second Meeting on April 17, 1958. At that time, Yugoslavia had submitted a proposal regarding Article 10 (Islands) three (3) days before the United States' amendment for the same article. The Yugoslavian proposal suggested a second paragraph for the Article which provided: "The provisions of Article 4 [Normal Baselines] and 5 [Straight Baselines] also apply to islands."[12] (U.N. Conf. LOS, 1958, p. 227). The Yugoslavian proposal was approved by a vote of 47 to 1 with 7 abstentions.

The comment accompanying the United States' proposed amendment to Article 10 stated:

> The statement by the International Law Commission that 'every island has its own territorial sea' fails to indicate where the baseline of an island is located. The outer limit of the territorial sea around islands, as is true in the case of all land masses, is determined

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Footnote continued—

quote subparagraph (f) regarding the general understanding of the meaning of the word "coast". (See discussion *infra*). The retention of the language of draft Article 4 in Article 3 of the Convention in face of the pointed objections of the United States indicates that the Conference was well aware of the broad scope of the term "coast" and that it should apply equally to islands as to the mainland.

12. The Yugoslavian proposal recognized that there is no inconsistency between the terms "islands" and "coast" or that bays under Article 7 are to be limited to indentations in the mainland alone.

> by the provisions of Article 6. (U.N. Conf., pp. 161-63).[13]

Mr. Ruedel on behalf of the French Government pointed out to the United States that the ILC had made adequate provision for baselines of islands by employing the flexible expression "along the coast" in Article 4. He further stated that the most defective text in that respect was the United States delegation's own proposal that the baseline was the low-tide line "on the mainland." (U.N. Conf., p. 163).

The American amendment for Article 4 was submitted together with those of other governments for consideration by the drafting committee. The final text of Article 4 as adopted by the First Committee implicitly rejected the United States' proposal in favor of the Yugoslavian proposal. That text became Article 3 of the Convention on the Territorial Sea and Contiguous Zone.

From this brief review of the *travaux* it is apparent that the drafters and delegates did not consider the terms "coast" and "islands" mutually exclusive. Neither did the Convention nor international law require islands be ignored in determining the existence of an indentation under Article 7.

III. MISSISSIPPI'S ACT OF ADMISSION CONFIRMS THE STATE'S TITLE TO MISSISSIPPI SOUND.

Mississippi contends that it owns the submerged lands of the Mississippi Sound by virtue of the cession made in its Enabling Act and that its title and ownership is con-

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13. Article 6 provided, "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."

firmed by the Submerged Lands Act, 43 U.S.C. §1301, *et seq.* and secured by Article IV, Sections 3 and 4 of the Constitution of the United States.

Congress in enacting the Submerged Lands Act recognized, established, and confirmed in the States the title and ownership of submerged lands beneath navigable waters within the boundaries of the respective States. 43 U.S.C. §1311(a). The term "boundaries" is defined by the Act to include ". . . the seaward boundaries of a state or its boundaries in the Gulf of Mexico or any of the Great Lakes . . . as heretofore approved by Congress, or as extended or confirmed pursuant to section 4 [43 U.S.C. §1312]." The Act provides that the terms "boundaries" and "lands beneath navigable waters" should not be interpreted as extending more than "three marine leagues into the Gulf of Mexico." 43 U.S.C. §1301(b). Section 4 of the Act, 43 U.S.C. §1312, expressly preserves any State's boundary beyond three miles ". . . if it has been heretofore approved by Congress." In admitting Mississippi to statehood, Congress established its southern boundary along the Gulf side of the barrier islands, thereby providing the "approval" recognized by the Submerged Lands Act.

The Special Master concluded that he was foreclosed from finding Mississippi's Enabling Act[14] on its face estab-

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14. In Mississippi's Enabling Act of March 1, 1817, Congress provided that the new State should

> consist of all the territory included within the following boundaries, to wit: Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same, thence east along the said boundary line to the Tennessee river, thence up a direct line to the north-west corner of the county of Washington, thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl River with Lake Borgne . . . . [Emphasis supplied].

lishes the southern boundary of the State as the southern coast of the barrier islands (Report, pp. 33-34).[15] In Reaching that conclusion, the Master referred to the Court's discussion of Louisiana's boundary description in *United States v. Louisiana*, 363 U.S. 1 (1960):

> And while 'all islands' within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act evidently contemplated no territorial sea whatever. (363 U.S. at pp. 67-68). [Emphasis supplied].

The Court referring to Mississippi's boundary description stated:

> We have already held with respect to Louisiana's claim to a three league maritime boundary that an Act of Admission which refers to all islands within a certain distance from the shore does not appear on its face to mean to establish a boundary line that distance from the shore, including all waters and submerged lands as well as all islands. There is nothing in Mississippi's history, just as there is nothing in Louisiana's to cause us to depart from that conclusion in this instance. (363 U.S. at p. 8).

A careful review of the claims of Louisiana and Mississippi at that stage of this litigation is helpful in understanding the issue.

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15. Likewise, the Master believed that finding foreclosed any application of Section 4 of the Submerged Lands Act, (43 U.S.C. §1312) which provides, *inter alia*:

> Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

In *United States v. Louisiana*, 363 U.S. 1 (1960), Gulf Coast States were attempting to establish claims in the Gulf in excess of the minimum three miles approved by the Submerged Lands Act. Louisiana claimed the phrase "including all islands within three leagues of the coast" in its Act of Admission confirmed its seaward boundary three leagues from its coast in effect conveying a three league belt of territorial seas. The United States argued that the boundary language encompassed only those offshore islands lying within that limit and not all waters within three leagues of the coast *where no islands existed*. Although the United States denied that the boundary language described any water areas between islands and the mainland, it conceded as follows:

> It happens that all the islands on the coast of Louisiana are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters; consequently the lands underlying those waters necessarily passed to the State upon its entry into the Union. *Pollard v. Hagan*, 3 How. 212. (Brief of the United States in Support of Motion for Summary Judgment on Amended Complaint, p. 177).[16]

16. The United States' position at that stage of the litigation is an anomaly of logic and reason. On the one hand, it appears to have denied that Louisiana's boundary language incorporated offshore islands and the intervening waters. At the same time, it also asserted that the waters between the mainland and offshore islands were internal waters which passed to the state on admission. It cited *Pollard* in support of its position. *Pollard*, however, recognizes state ownership of navigable waters within state boundaries, not waters beyond those boundaries. The United States' argument would have required the Court to recognize two types of inland waters, those within state boundaries and those outside those boundaries which were retained by the United States. This situation would certainly have been a novel interpretation inasmuch as it has always been presumed that federal claims began only where the internal waters end, with the individual States holding the title to inland waters.

In its discussion of Mississippi's boundary description, the United States made a similar concession relating to Mississippi Sound. It stated, *inter alia*:

> As in the case of Louisiana (*supra*, p. 177), we need not consider whether the language 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not) . . . . *Thus, the only practical issue between the United States and Mississippi is whether the statutory expression 'including all islands within six leagues of the shore,' described a water area (containing no islands) extending more than three miles seaward of the outermost island off Mississippi.* (Brief for United States, Exhibit J-8, p. 254). [Emphasis supplied].

The Court noting these concessions stated:

> The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus Louisiana is entitled to the lands beneath those waters quite apart from the affinitive grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagan*, 3 How. 212. (363 U.S. 67).

Implicit in the Court's conclusion under *Pollard* is the finding that waters lying between Louisiana's offshore islands and the mainland were in fact "navigable waters *within* the territorial boundaries" of the State. By subsequent reference, the Court applied its analysis to Mississippi. (363 U.S. 82, n. 135).

Mississippi's Enabling Act (1817) describes the boundary line of the State in carefully chosen language and provides that the territory within those boundaries belongs to the State. The southern boundary line is described as extending to the Gulf of Mexico and "including" all islands which may be within six (6) leagues of the shore. It is significant that the Act defines the territory of the State as that "within" the prescribed boundaries and then proceeds to detail the specific boundary line which forms the perimeter of the state. The southern boundary is drawn so as to include or enclose all islands within six (6) leagues of the shore. Since no islands lie seaward of the Mississippi barrier islands, those islands formed the southern boundary of the state under its Enabling Act. *Louisiana v. Mississippi*, 202 U.S. 1, 46-47 (1905). Mississippi Sound is within the boundaries so described and therefore constitutes a part of the territory of Mississippi.

In the present proceedings, the United States has receded from its previous concession regarding Mississippi Sound as inland waters.[17] The Special Master assumes for the sake of his analysis, but without deciding the question, that the United States is not bound by its previous con-

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17. Although the Executive Branch has now abandoned its previous position that Chandeleur Sound is inland waters, it has entered into a stipulation with Louisiana that the State is entitled to the submerged lands underlying the Chandeleur Sound. (See Stipulation Exhibit No. J-119). Under the circumstances set forth in the stipulation, the Executive Branch recognizes Louisiana's exclusive right to the lands underlying the Chandeleur and Breton Sounds, while at the same time denying any claims to the area as inland waters.

The stipulation with Louisiana can be supported only by a finding by the Court that the Chandeleur Islands form the State's coastline, thereby making the waters landward of the islands internal. Mississippi contends that the only instances in which Congress may have approved a cession of Chandeleur and Breton Sounds to Louisiana are its Act of Admission (1812) and the Submerged Lands Act (1953).

(Continued on following page)

cession. (Report, p. 32). Mississippi has shown that the concession respecting Mississippi Sound was made after careful consultation among the Departments of the United States and reflects the United States policy at that time. (See Report, pp. 39-44, 47-54). The Court in relieving the United States of its concession noted, *inter alia*:

> Louisiana has not relied to its detriment on the concessions which appear to have been made primarily for purposes of reaching agreement on the leasing of the submerged lands pending a final ruling on their ownership. The Interior Agreement of 1956 specifically recognized that neither party would be bound by its position. (394 U.S. 11, 73, n. 97).

Moreover, the Court further noted that the concession *did not include* as inland waters the particular section of the Louisiana coast before the Court, *i.e.* "Isle au Breton Bay."

Footnote continued—

Jonathan I. Charney of the Justice Department, in a letter dated June 6, 1972, stated that despite the stipulation with Louisiana regarding Chandeleur Sound:

> No such stipulation or reliance has taken place with respect to the rights of Mississippi and Alabama in Mississippi Sound and, if pressed, I would assume we would take the position that the limit of the States' rights is the 3-mile limit shown of the Task Force Documents. (Exhibit M-101).

Such discrimination between the rights of two adjoining States is manifestly unjustified. Congress in admitting the States to the Union has assured them of an equality of treatment at the hands of the Federal Government. This fundamental concept of fairness or "equal footing" among the States has been held to include political rights and matters of sovereignty, including property rights, to submerged lands. (*U.S. v. Texas*, 339 U.S. 707 (1950)). To permit the Executive Branch to exercise the discretion to determine property rights of the United States and individual states on the basis of political expediency or litigation strategy especially where underlying facts are disputed would be to give the Executive Branch a prerogative expressly reserved to Congress.

Mississippi's situation is quite different. It was joined as a party subsequent to June 24, 1957. (*U.S. v. Louisiana*, 354 U.S. 515 (1957)). Prior to that time Louisiana was the sole defendant in the proceeding. Consequently, Mississippi was not a party to the 1956 Interim Agreement between the United States and Louisiana, nor did it enter into any agreement with the United States for leasing submerged lands. While the agreement with Louisiana expressly provided neither party would be bound by the so-called Chapman Line along the Louisiana coast, no such line was ever depicted along the Mississippi coast, nor did the United States express any reservations with respect to Mississippi Sound as inland waters. It is significant that the concession which the United States now seeks to withdraw involved the very same area now in dispute.

Mississippi submits that the plain language of Mississippi's boundary description is confirmed by reference to extrinsic evidence. (See *Missouri v. Kansas*, 313 U.S. 78 (1909)). Inasmuch as a substantial portion of the documentary evidence and testimony received by the Special Master related to the location of the State's southern boundary, it is submitted that the matter should be referred to the Master for further findings of fact.

CONCLUSION

For the foregoing reasons the State of Mississippi respectfully submits that the Special Master's recommendations be accepted and adopted by this Honorable Court based on the prior findings as well as the alternative theories advanced herein, the Motion of the State of Mississippi granted, and a supplemental decree be entered in accordance therewith and that the Cross-Motion of the United States be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.
(ALABAMA AND MISSISSIPPI BOUNDARY CASES)

ON THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

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ON THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE UNITED STATES

It is not every day that a litigant who has twice won all he sought complains that he should also have been awarded the same prize on still other grounds. Yet, that is now the stance of the defendant States in this case. The Special Master's Report recommends a decree that would vindicate the claims of Alabama and Mississippi in full—allocating to those States every acre in dispute. What is more, the Master supports that result on two independent bases: (1) by finding a "juridical bay" encompassing the whole of Mississippi Sound, premised on treating Dauphin Island as an extension of the mainland; and (2) by concluding that the United States, and therefore the States, acquired title to the Sound as an "historic bay." As the unsuccessful party, we have, naturally enough, challenged both rulings. U.S. Br. 6-20, 20-33. The surprise is that the States have also filed Exceptions to the Master's Report, together with elaborate supporting arguments.

We are perhaps entitled to derive some comfort from this unusual circumstance. Of course, Alabama

and Mississippi are entirely free to quarrel with the Master because he rejected some of their contentions, albeit he reached the same result for other reasons. But one may ask why those who have prevailed on two arguments insist that they should also win on as many as three additional grounds. The only apparent explanation is that the States are not sanguine about the soundness, and therefore the viability, of their tentative victory if it must rest on the Master's Report. We agree that they have cause for concern. But, in our view, the attempt to shore up the recommended decree with new props is equally unavailing.

I. MISSISSIPPI'S EXCEPTIONS

Mississippi's Exceptions are all the more extraordinary because, in each instance, the complaint is that the Special Master did not take it upon himself to rewrite the governing principles in disregard of this Court's clear precedents. As we detail in a moment, Mississippi is in effect re-arguing points firmly settled many years ago in this very case or in related proceedings involving Louisiana. Obviously, the Master was bound by those rulings. The Court itself is presumably free to reconsider them. But, in the context of sovereign claims to land, there are at least two reasons to decline the invitation.

The first is simply the strong tradition against disturbing real property rights and the rules that control title. See *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 17-18 n.10; *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 13-14. Equally important, however, is the rudimentary principle that the States are members of the Union on an equal footing. That doctrine is relevant here. *E.g.*, *United States* v. *Maine*, 420 U.S. 515, 523, 527-528 (1975); *United States* v. *Texas*, 339 U.S. 707, 717-718 (1950). As the Court has expressly held, the rules of the international Conven-

tion on the Territorial Sea must be applied uniformly to all coastal states. *Louisiana Boundary Case*, 394 U.S. 11, 33-34 (1969). See also *id.* at 72-73.[1] Accordingly, a special conservatism is appropriate here in avoiding a revision of coastline delimitation principles that controlled earlier controversies. Mississippi ought fare no better and no worse than its sister, Louisiana. Cf. *United States* v. *Louisiana*, 363 U.S. 1, 83 n.140 (1960).

With this preamble, we turn to consider seriatim the three Exceptions submitted by Mississippi.

A. Article 4 straight baselines

In its two first Exceptions (Miss. Br. 3), argued together (*id.* at 7-17), Mississippi contends that the "straight baseline" system condoned by Article 4 of the Convention on the Territorial Sea (App., *infra*, 1a-5a) should be applied to the area of Mississippi Sound, notwithstanding the deliberate decision of the United States not to adopt that method of coastline delimitation for this or any other area. This plea is, on its face, directly contrary to the Court's express holding that "the choice * * * to use the straight-base-line method for determining inland waters * * * rests with the Federal Government, and not with the individual States," and the corollary that this Court will not "review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders" by invoking the "optional method" of Article 4. *United States* v. *California*, 381 U.S. 139, 168 (1965); *Louisiana Boundary Case*, 394 U.S. at 72, 73. The pres-

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[1] For the Court's convenient reference, we have reproduced in an appendix, pages 1a-5a, *infra*, the full text of Articles 1, 3, 4, 5, 6, 7, 10 and 14 of the Convention. Although the effect of most of the provisions is undisputed, each is of some relevance to the issues presented.

ent attempt to circumvent those rulings should be rejected.

The only circumstance in which a current disclaimer of straight baselines by the federal Executive might be ineffective is where, as a matter of "firm and continuing international policy," the United States has, "in effect, utilized the straight baseline approach sanctioned by Article 4 of the Convention," and the Government now seeks to "abandon" that "consistent official international stance" "solely to gain advantage in a lawsuit to the detriment of [a State]." *Louisiana Boundary Case*, 394 U.S. at 74 n.97. But this is not remotely such a situation, as this Court effectively ruled when it rejected an identical claim by Louisiana. 420 U.S. 529 (1975).

1. It has not been shown that the United States at any time—much less for a sustained period—maintained a "consistent official international stance" of drawing straight baselines which clearly did, or by necessary implication would, enclose Mississippi Sound. At best, the available materials point to *inconsistent* positions, usually taken in a *domestic* litigation context, or reflect *unofficial* views. The only conclusion, as this Court and the International Court of Justice have both indicated, is that no clear international law rules on the definition of "inland waters" existed before the Convention on the Territorial Sea and that, in any event, the international stance of the United States was vacillating and uncertain. See *United States* v. *California*, 332 U.S. 19, 32-33, 37-38, 39-40 (1947); *United States* v. *California*, 381 U.S. at 163 n.27, 165-166 & n.33; *United Kingdom* v. *Norway*, [1951] I.C.J. Rep. 116, 131.

What is more, any change in the position of the United States certainly was not motivated by domestic considerations. When the United States adhered

to the Convention on the Territorial Sea in 1961, it was not supposed this would affect federal-state boundaries under the Submerged Lands Act. Indeed, in the ensuing several years we argued *against* the relevance of the Convention for such internal controversies, but this Court ruled otherwise. *United States* v. *California*, 381 U.S. at 164. Yet, the United States has eschewed the straight baseline method of coastline delimitation from the beginning, well before the domestic implications were known. That we persist in the stance—declining to draw straight baselines anywhere, including Mississippi Sound—cannot be presumed to be for the purpose of "gaining advantage" over Mississippi and Alabama, much less "solely" with that objective. Moreover, such a *continuation* of prior policy disclaiming the benefit of Article 4 obviously is not the kind of suspect "abandonment" of an international stance to which the Court adverted.

2. If any doubt remained, it was put to rest when the Court and its Special Master confronted the identical issue in the *Louisiana Boundary Case* after the decision rendered in 1969. Invoking the caveat in that opinion we have just noticed, the State argued that the United States had, in practice, employed a straight baseline approach to enclose several areas that did not qualify as bays under Article 7 of the Convention—including Caillou Bay and the whole of East Bay—and could not successfully abandon that stance. See Special Master's Report of July 31, 1974, at 7-13. The evidence in support of that contention was, for the most part, the same as it is here, including statements by State Department officers, by the Secretary of the Interior and by the Solicitor General. But the Special Master summarily rejected the plea. *Id.* at 13. And the point received no better reception from the Court itself when it was renewed

on exceptions. See Exceptions of the State of Louisiana (filed Nov. 1974) at 16-22, 46-59, 62-66, 123-129, and App. I, at 7-19, 35-45, 59-136, 129-145, 184-200, overruled, 420 U.S. 529. There is no arguable justification for giving the identical argument more favorable treatment now that it is advanced by neighboring Mississippi. See also U.S. Br. 22, 24, 26-33.

B. Mississippi Sound as a bay without treating Dauphin Island as a mainland extension

Perhaps the boldest feature of Mississippi's Exceptions is the extensive argument (pp. 17-39) devoted to the theme that the whole of Mississippi Sound qualifies as a juridical bay under Article 7 of the Convention even if the Court rejects (as we believe it should) the Special Master's recommendation that Dauphin Island be treated as an extension of the mainland. As we understand the contention, the State is *not* suggesting a closing line to Mobile Point (which would exceed 24 miles) or a unitary bay embracing the waters of Mobile Bay. See, *e.g.*, U.S. Br. App. 1a, Chart 1. Rather, the putative bay is closed at the east by a line from Petit Bois Island to Dauphin Island and another line from Dauphin Island northerly to Cedar Point on the mainland. This is the same area defined as a juridical bay by the Special Master, but in his case on the premise that Dauphin Island should be treated as an extension of the Cedar Point mainland. Mississippi insists the premise is unnecessary, and thereby sets itself at odds with at least two propositions expressly announced by this Court.

1. It seems perfectly plain on the face of the Convention that Article 7(2) (App., *infra*, 2a) requires of a bay, before it qualifies as such, that it meet the semi-circle test *and* that it be "a well-marked indentation whose penetration is in such proportion

to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." What is more, we read the Court's opinion in the *Louisiana Boundary Case*, 394 U.S. at 54, as unambiguously so holding. Accordingly, we will not follow Mississippi through the "legislative history" of the Convention. Miss. Br. 25-34. We accept the proposition as finally, and correctly, settled.

If, then, Mississippi Sound does not qualify as a bay merely by satisfying the semi-circle test, the critical question is whether the Sound as a whole constitutes a "well-marked indentation" and "encloses landlocked waters". We have already articulated our view that, except for relatively small bays at either end, Mississippi Sound is not an "indentation" and its waters are not "landlocked", *even if* Dauphin Island is deemed an arm of the mainland. U.S. Br. 15-20. *A fortiori*, that is so if Dauphin Island is treated as the island nature defined. Indeed, in that case, the Sound has no "headland" or "entrance point" at all on the eastern side.

2. Undeterred, Mississippi at this point (Br. 29-39) challenges another set of unequivocal holdings by the Court: that "Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland" (*Louisiana Boundary Case*, 394 U.S. at 67 (emphasis in original)); that "bays are indentations in the *mainland*," and that "islands off the shore are not headlands but at most create multiple mouths to the bay" (*id.* at 62 (footnotes omitted)). For our part, we do not re-argue matters so fully considered by the Court. See *id.* at 60-63, 66-71. We are content to close on this point by referring the Court to the map (*e.g.*, U.S. Br. App. 1a, Chart 1), which makes very clear that there is no appropriate eastern headland, no indentation encompassing landlocked waters, and therefore

no bay, in the main stretch of Mississippi Sound if Dauphin Island is not viewed as an extension of the mainland.

C. Mississippi's Act of Admission

Mississippi's last Exception (Miss. Br. 39-46) is at least as remarkable as the others in its refusal to accept anything already decided. As the State recites (Miss. Br. 40-41), the Special Master concluded that this Court's 1960 decision foreclosed a finding that the Congressional legislation admitting Mississippi to the Union, of its own force, granted or confirmed to the new State the submerged lands underlying Mississippi Sound, or that the Enabling Act fixed the State's "boundary" so as to encompass those water bottoms. Report 33-34. In our view, that conclusion was compelled by the Court's holding that the Mississippi Enabling Act and the congressionally approved State Constitution, in referring to the offshore islands, did not thereby "establish a boundary" or "include" all intervening "waters and submerged lands." *United States* v. *Louisiana*, 363 U.S. at 81. Yet, without even renewing its earlier Motion for Relief from final Decree (see 457 U.S. 1115 (1982))—which the Master recommended be denied (Report 3 n.2)—Mississippi now argues that its Enabling Act, without more, resolves in its favor the inland status of Mississippi Sound.

1. It is true that the stance of the parties was different in the proceedings leading to the 1960 decision. The United States was then conceding the inland status of Mississippi Sound, albeit expressly *not* on the basis of the Enabling Act description. See Miss. Br. 42-43. But it is clear the Court did not endorse that position. On the contrary, the Court expressly avoided approval of a like concession in respect of Louisiana (363 U.S. at 66-67 n.106) and referred to that discussion when disclaiming any ruling on the location of Mississippi's coastline. 363 U.S. at 82 n.135. And the point was emphatically reaffirmed a decade later when Louisiana sought to invoke estoppel against the United States. See *Louisiana Boundary Case*, 394 U.S. at 73 n.97.

On the other hand, Mississippi, also, was urging a different result in 1959. The State was then asserting a maritime boundary six leagues (18 miles) from shore, neither measured to, nor from, the barrier islands. Indeed, in those days, the State was disclaiming those islands, said to be "impermanent" and "constantly shifting," as a boundary. 363 U.S. at 82; see also Supplemental Brief of the State of Mississippi, at 3-4, 6-7 (No. 10, Orig., 1959 Term). We, of course, do not suggest that Mississippi ought to be held to that position. But what is dispositive, in our submission, is the Court's firm rejection of Mississippi's "historic boundary" claim under Sections 2 and 4 of the Submerged Lands Act. 43 U.S.C. 1301(a)(2), 1301(b), 1312. Unless the 1960 decision is to be overruled, Mississippi and Alabama (like Louisiana) are restricted to a 3-mile belt of submerged lands measured from their present "coastlines," the location of which is to be fixed by reference to current geography or prescriptive usage, not a congressional boundary description. In sum, the Court has effectively decided that their Enabling Acts do not aid Mississippi or Alabama in locating their coastlines.

2. Even if the question were entirely open, however, Mississippi's strained reading of its Enabling Act could not survive scrutiny. How does a description that merely "includes" "all the islands within six leagues of shore" fix a boundary line anchored on a string of islands that are never more than 10 miles from shore? The Court's reasons for rejecting a uniform three league line in the case of Louisiana and a six league line in the cases of Mississippi and

Alabama (*United States* v. *Louisiana*, 363 U.S. at 67-69, 81-82) are even stronger as applied to a variable line that does not evenly parallel the shore and is barely half the stated distance away. We do not pursue the point: it is plain Mississippi's "conservative" alternative reading of its Enabling Act is entirely contrived.

3. We must add our own puzzlement that Mississippi should insist that the barrier islands "formed the southern boundary of the State under its Enabling Act." Miss. Br. 44. If that were so, the State's entitlement under the Submerged Lands Act would include nothing seaward of a line connecting those islands, since the Act grants no submerged lands beyond state "boundaries." 43 U.S.C. 1301(a)(2), 1301(b), 1311(a). Thus, while gaining title to the relatively small disputed "enclaves" within Mississippi Sound, Mississippi must forego the three-mile belt seaward of the barrier islands—which is otherwise conceded.

Presumably, Mississippi wants the benefit both of an "historic" admission boundary and a standard 3-mile territorial belt measured from the modern "coastline". That is not possible, however. The line of the barrier islands can be claimed as a "coastline" or a "boundary," but not both. The two terms are never confused in the Submerged Lands Act. "Boundary," as used in the Act, is *always* the outward limit of the grant, whether the boundary is a fixed "historic" boundary or an ambulatory boundary at the seaward edge of the standard three-mile belt grant. A boundary is not a baseline or coastline from which the grant is measured. So, also, the unique option afforded the Gulf States—to claim the standard 3-mile belt from the current coastline or out to an admission boundary—presents two self-contained alternatives, which cannot be merged. As the Court wrote in the context of the Texas "historic" claim, a State "may not combine the best features of both grants in order to carve out the largest possible area for itself." *United States* v. *Louisiana*, 389 U.S. 155, 160 (1967). See, also *Texas Boundary Case*, 394 U.S. 1 (1969).

In the current proceedings, Mississippi fixes its admission boundary at the line of the barrier islands. To be sure, it claims a further three-mile belt to the south. But it does not, and could not on the face of the Enabling Act, assert that its historic boundary is described as a line three miles seaward of the islands. Since a boundary is by definition the limit of the grant under the Submerged Lands Act, there is no basis whatever for "tacking on" a three-mile belt if, as the State maintains, the boundary ends at the barrier islands. Of course, Mississippi is entitled to the standard grant of three miles south of the islands if the barrier islands and the closing lines between them form the seaward limit of inland waters (contrary to our submission), or, in any event (albeit in slightly varied form), to the same zone as territorial sea of the islands. But the State can make this claim, on either theory, only if it abandons the assertion that its boundary was and is the barrier islands. Mississippi cannot have it both ways. The barrier islands form a boundary or a coastline; they cannot be both.

II. ALABAMA'S EXCEPTIONS

Alabama lodges two complaints against the Special Master's Report which, as in the case of Mississippi, betray unease about the grounds on which victory was tentatively awarded, and it urges the Court to supply new foundations for the same result. We consider the Exceptions in turn.

A. The claimed "historic land boundary"

The argument primarily advanced by Alabama is in some respects elusive. Unlike Mississippi, Ala-

burna apparently does not claim an "historic boundary" under the Submerged Lands Act. Ala. Br. 4-5 n.1. Indeed, what is asserted is a "land boundary," said to have been fixed by the State's Enabling Act "as historically interpreted" at the line connecting the barrier islands, which now constitutes Alabama's "coastline" for the purposes of the Submerged Lands Act. *Id.* at 4. This involves some sleight-of-hand. It is nowhere explained how an Enabling Act which does *not* "on its face" encompass the lands underlying Mississippi Sound nevertheless immediately vested title to those water bottoms merely because it was later so "interpreted." Nor is it shown how a "boundary" description can do service as a "coastline", from which a new boundary three miles seaward is measured. See pages 10-11, *supra*.

These semantic difficulties reflect the more fundamental flaws of Alabama's argument. What the State is seeking to establish is a title acquired under the Equal Footing Doctrine, which, in its view, irrevocably freezes ownership of any submerged lands that underlay what were inland waters when the State was admitted to the Union. For our part, we believe the stated proposition of law is false and, in any event, would not sustain Alabama's claim to Mississippi Sound.

1. *The Legal Theory*

We cannot accept Alabama's basic premise: that the gloss of *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-378 (1977), on the rule of *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), governs water bottoms like those underlying Mississippi Sound. The State insists that, at statehood, it received indefeasible title to those submerged lands, proof against any subsequent change in geography or law. Thus, according to Alabama, if Mississippi Sound was inland

water in 1819, it is entitled to the underlying bed—plus a 3-mile Submerged Land Act grant measured from the seaward edge of the Sound—regardless whether today the Sound qualifies as inland under the Convention and the Submerged Lands Act. *Corvallis* presumably would dictate that result if we were concerned with inshore non-tidal navigable waters.[7] But we deem it plain no such principle applies in tidal waters—at least those whose status affects the baseline for measuring the territorial sea.

(a) We assume that the *Pollard* doctrine applies to all navigable inland waters, whether tidal or non-tidal. But *Pollard* does not tell us which waters are inland. Beyond the shore of the mainland, the Court more recently has told us, the delimitation of inland waters is governed by the Convention on the Territorial Sea. *United States* v. *California*, 381 U.S. 139. The rules of the Convention—except for the special case of "historic waters"—ignore earlier law and past geography and establish ambulatory boundaries for bays. If, because of geographical changes (whether natural or artificially caused) a former bay ceases to meet the criteria, it loses its inland water status.[8] *Per contra*, water areas that formerly did

[7] We say "presumably" because, notwithstanding what was said in *Corvallis* (429 U.S. at 371-372 n.8), it is difficult to escape the conclusion that the Submerged Lands Act expressly announces an ambulatory rule even for non-tidal navigable water bottoms, the State's title to which is not frozen, but reaches "to the ordinary high water mark *as heretofore or hereafter modified by accretion, erosion, and reliction.*" 43 U.S.C. 1301(a)(1) (emphasis added). While *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273 (1982), dealt with *tidal* areas, the Court's recognition of the Submerged Lands Act as the controlling federal rule of decision in that context may suggest that the Act also governs State title to nontidal submerged lands, equally embraced by the statute.

[8] This can occur in many different ways: alluvion or accretion within the bay may reduce the water area so that it no

not qualify as bays can become bays and assume inland water status because of geographical changes or simply because the more generous 24-mile rule now encompasses what were once deemed "open sea" areas. So, too, the Convention defines the seaward edge of tidelands—the mean low water line of the shore on an open coast—as ambulatory, adding or subtracting from "historic" tidelands as nature (aided or unaided) or a man-made jetty alters the coastline.

All this is, of course, wholly at odds with the *Corvallis* principle of irrevocable vesting at statehood, regardless of later geographical changes. How do we reconcile these conflicting rules? To be sure, it is theoretically possible to say that the area encompassing what was a bay at statehood—to the then high-tide line around the interior perimeter and the then closing line at the mouth—remains in State ownership as a matter of domestic law under *Pollard*, regardless that changes in geography have made that area upland as a matter of federal law or open seas as a matter of international law. That result would be extremely awkward, requiring us to retrace all physical geography as of the date of statehood in order to sort out all riparian land titles and to determine the "coastline" for purposes of the Submerged Lands Act whenever it is alleged that a statehood bay—fortuitously still "inland water"—once existed at any point on the modern coastline. See *United States* v. *California*, 381 U.S. at 165-166 n.23.

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longer meets the semi-circle test or loses its character as a "well-marked indentation"; erosion may wear away, or a violent storm may wash away, one or both headlands so that the water is no longer "land-locked" or the closing line exceeds 24 miles; a former headland may become an island, depriving the bay of one of its mainland "arms"; or islands screening the mouth may disappear and lengthen the water crossing to the point where the semi-circle test can no longer be met.

Fortunately, however, it seems plain neither Congress nor the Court has construed *Pollard* to require any such complex investigation.

(b) Until the *Corvallis* decision in 1977, it was generally assumed, even with respect to the beds and banks of *non-tidal* navigable water bodies, that, although *navigability* was determined as of the date of admission, the boundaries of the State's title under *Pollard* shifted as the high water mark later moved as a result of erosion, reliction or accretion. See *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318-321, 322-327 (1973). That is the understanding codified in the Submerged Lands Act of 1953. 43 U.S.C. 1301(a)(1). See note 2, *supra*. All the more, it was universally accepted that State title to inland *tidal* water bottoms and tidelands (between high and low water lines) is ambulatory. This is evident in the decrees entered by the Court in the pre-Submerged Lands Act cases (*United States* v. *California*, 332 U.S. 804 (1947); *United States* v. *Louisiana*, 340 U.S. 899 (1950); *United States* v. *Texas*, 340 U.S. 900 (1950)); in the definitional provisions of the Act (43 U.S.C. 1301(a)(2)); in the Court's second *California* decision importing the current "coastline" and "inland water" rules of the international Convention—which are ambulatory—to define the limits of the Submerged Lands Act grant to the States (381 U.S. 139 (1965)); and in *Hughes* v. *Washington*, 389 U.S. 290 (1967), which effectively deprived the State of former tidelands in favor of the riparian owner where accretion had occurred along the coast.

It can be said that *Corvallis* repudiated these assumptions and announced a rule that State title, once vested at statehood under *Pollard*, can never be divested, except as the State itself chooses to do so. But the Court has since made it clear that *Corvallis*—itself concerned with inshore waters—does not affect the traditional ambulatory principle governing off-

shore water boundaries. The dispositive decision is *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273 (1982), in which the Court reaffirmed *Hughes* v. *Washington* (*id.* at 282-283, 284, 288) and rejected the contention that State title to tidelands was irrevocably vested by the Equal Footing Doctrine. *Id.* at 286 n.14. The upshot is that the *Corvallis* "freezing" principle has no application to the beds or shores of waters that affect the coastline.[4]

(c) Given that once permanently or periodically submerged areas that once qualified as bays are not irrevocably vested in the State as a matter of constitutional law, it is not apparent why changes in law

[4] This conclusion is re-inforced when we look at the other side of the coin. We assume that States are entitled to the beds and shores of bays formed or qualifying *after* statehood, to the subsequently submerged area of bays that have grown in size, and to newly formed tidelands along the open coast. Clearly, such new inland water areas or tidelands affect the "coastline" under the Submerged Lands Act. Yet, according to *Corvallis*, the *Pollard* Equal Footing Doctrine is fully spent at statehood and grants nothing thereafter. 429 U.S. at 376, 378. This might suggest that "inland water," so far as relevant in fixing the baseline from which the marginal sea is measured under the Submerged Lands Act, has nothing to do with the *Pollard* doctrine. Are there then "*Pollard* bays" and "Submerged Lands Act bays," and some that are partly of one character and partly of the other? Is it the same for coastal tidelands? Where the bay was formed long ago, but after statehood, within federal lands, did the State only acquire title to the bed in 1953? And if the post-statehood bay was carved out of private land, how did the State acquire title at all, at least in the absence of a pre-existing State law rule? See *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967) (Stewart, J., concurring). These questions lead us back to the traditional understanding of the *Pollard* rule as effecting a *continuous* grant with *embolating* boundaries. In sum, *Corvallis* only applies inshore, and a less rigid *Pollard* principle, as codified in the Submerged Lands Act, governs all inland waters and tidelands that affect the State's coastline.

should not occasionally work a divestiture to the same extent as a change in geography. Indeed, the recent *California ex rel. State Lands Commission* case indicates that Congress can, by fashioning an accretion rule favorable to the United States, effectively deprive a State of some of its historic tidelands. See 457 U.S. at 283-284, 287. What is more, the Court has applied the Convention as domestic law in denying State claims to inland waters which the United States had conceded under its prior understanding of international law rules. That was true with respect to Caillou Bay and Isle au Breton Bay in Louisiana (see *Louisiana Boundary Case*, 394 U.S. at 66-67 n.87, 73-74 n.97) and Florida Bay in Florida, anchored in the Keys (see *United States* v. *Florida*, 420 U.S. 531 (1975); 425 U.S. 791 (1976)).

To be sure, the States invoke the caveat in *United States* v. *California*, 381 U.S. at 168, to the effect that the "contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." But this was written in the context of a ruling that *approved* the wholesale adoption of new international rules as controlling State offshore rights and cannot reasonably be understood to require rejection of any application that, contrary to the usual result, disadvantages a State. Indeed, the point was clarified four years later in the *Louisiana Boundary Case*, 394 U.S. at 74 n.97, where the Court said the Federal Government "arguably could not abandon [a consistent official international] stance solely to gain advantage in a lawsuit to the detriment of [a State]." Obviously, this description does reach any changes in inland water delimitation rules directly resulting from United States adherence to the Convention on the Territorial Sea, which *the Court*, over our objection, imported as the law of these cases.

See *United States* v. *California*, 381 U.S. at 164; pages 4-5, *supra*.

The whole rationale for adopting the comprehensive rules of the Convention as the "coastline" law of the Submerged Lands Act would be defeated if each application to a particular segment had to be tested against some supposed prior criteria and rejected if, in that context, the State fared less well. Cf. *California ex rel. State Lands Commission* v. *United States*, 457 U.S. at 286 n.14. Nor is it merely a matter of avoiding awkward burdens and pretexts for further controversy. This is a situation in which localized State concerns must yield to the broader national policies which inform the setting of a uniform international stance. Here, no less than in the case of coastal tidelands, we deal with "waters that lap both the lands of the State and the boundaries of the international sea," whose status is "too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land'." *Hughes* v. *Washington*, 389 U.S. at 293, reaffirmed in *California ex rel. State Lands Commission* v. *United States*, 457 U.S. at 280, 283, 288. See also, *United States* v. *California*, 382 U.S. at 29, 34-36, 40.

2. *The Factual Record*

Even if Alabama had been admitted to the Union with a boundary description that unambiguously drew the line of State dominion at the barrier islands, we do not believe that would resolve the issue presented whether Mississippi Sound is, today, State inland water. As it happens, however, that hypothetical question need not be answered because the Court has already effectively held that the Alabama Enabling Act of 1819, like the Mississippi Act of two years before, established no boundary beyond the mainland shore. *United States* v. *Louisiana*, 363 U.S.

at 82. See pages 8-9, *supra*. Nor was this a ruling merely as to the meaning of the Enabling Act "on its face." Although, in the case of Alabama, the opinion does not detail all the historical data dating from both before and after 1819, urged as aids to construction, it is plain the Court surveyed all the evidence tendered by Alabama, as it had for Louisiana and Mississippi (see 363 U.S. at 71-79, 80-81), before concluding that the Alabama Enabling Act fixed no offshore boundary.

(a) Against this background, Alabama's attempt to reinterpret its Enabling Act in light of historic materials ought to be rejected as barred by principles of finality. Cf. *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 10-22. At all events, even if the matter is deemed open, Alabama's Enabling Act claim is no stronger than Mississippi's and must be denied on the merits. See pages 9-10, *supra*. This does not quite end the debate only because Alabama is presumably free to argue, independently of any reliance on the Enabling Act, that, as a historical fact, Mississippi Sound was inland water in 1819 and that title to its bed therefore vested in the new State upon its entry into the Union. We briefly address that possibility.

(b) Again, Alabama's claim in this respect is, if anything, weaker than Louisiana's and ought fare no better. We invite the Court to compare the materials now tendered by Alabama (Ala. Br. 7-23) with the comparable menu of bits and pieces served up by Louisiana in 1959 (363 U.S. at 70-79) and 1974 (Exceptions of the State of Louisiana at 10-12 and App. I, at 63-126, 129-210). As one might expect, Louisiana easily wins the contest for the number and variety of dishes offered. Nor was that State reluctant to complain that depriving it of the submerged lands underlying Caillou Bay and all of East

Bay would work an impermissible "contraction of territory." That phrase occurs at least seven times in the papers filed by Louisiana in this Court. Exceptions of the State of Louisiana at 9, 46 and App. I, at 8, 16, 35, 41, 47. And yet, both the Special Master and the Court rejected the plea. Special Master's Report of July 31, 1974, at 16, 21-22; 420 U.S. 529 (1975). So it should be here.

It would unduly burden this submission to discuss each of the items put forward by Alabama. Ala. Br. 7-23. Even accepting the State's one-sided presentation as painting an accurate picture, it is obvious that nothing in these materials comes close to proving the inland status of Mississippi Sound in 1819. And, we repeat, such a demonstration, if made, would not establish Alabama's title today.

B. The Smaller Juridical Bay

Alabama's second Exception will not detain us. It matches our own second Exception and therefore requires little comment. See U.S. Br. 15-20. In sum, we fully agree with Alabama that *if* Dauphin Island is an extension of the mainland, it would be appropriate to draw a smaller bay closed by a line from Dauphin Island to Point Aux Chenes. See U.S. Br. App. 3a, Chart 3. Indeed, in our view, that is the *only* bay that would result. Our disagreement with Alabama is simply that we dispute the premise that Dauphin Island should be treated as an arm of the mainland.

CONCLUSION

For the reasons stated here, the several Exceptions to the Report of the Special Master filed by Alabama and Mississippi should be overruled; for the reasons stated in our opening brief, the Exceptions of the United States should be sustained; and a decree should be entered accordingly.

Respectfully submitted.

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AUGUST 1981

APPENDIX

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

(Apr. 29, 1958, 15 U.S.T. 1606)

PART I: TERRITORIAL SEA

SECTION I. GENERAL

Article 1

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

* * * * *

SECTION II. LIMITS OF THE TERRITORIAL SEA

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 4

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

Article 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

3. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

4. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

• • • • •

Article 10

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

• • • • •

SECTION III. RIGHT OF INNOCENT PASSAGE

SUB-SECTION A. RULES APPLICABLE TO ALL SHIPS

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.

2. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters or of proceeding to internal waters, or of making for the high seas from internal waters.

3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law.

5. Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea.

6. Submarines are required to navigate on the surface and to show their flag.

• • •

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No. 9, Original

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS,
MISSISSIPPI, ALABAMA
AND FLORIDA
(MISSISSIPPI BOUNDARY CASE)
Defendants.

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REPLY BRIEF FOR THE STATE OF MISSISSIPPI

I. MISSISSIPPI SOUND CONSTITUTES A JURIDICAL BAY AND INLAND WATERS OF THE STATES OF MISSISSIPPI AND ALABAMA.

In its Exceptions and Brief, the United States insists the Special Master reached the wrong conclusion in finding Mississippi Sound constitutes inland waters of the States of Mississippi and Alabama.[1] It specifically denies that the

1. The United States prior to the publication of the Baseline Committee charts in April, 1971 recognized the Sound as internal waters of the States of Mississippi and Alabama based upon various theories: (a) application of the ten mile rule or fictitious bay concept, Mississippi Exhibit 101 and Report, pp. 41-44 and 47-54 (waters enclosed between the mainland and offshore islands so closely grouped that no entrance exceeded ten miles in width were considered inland waters); (b) the ruling in *Louisiana v. Mississippi*, 202 U.S. 1 (1905), Report, p. 32 (quoting from Brief for the United States, p. 254 in *United States v. Louisiana*, 363 U.S. 1 (1960), Exhibit J-84); (c) ruling in *Pollard's Lessee v. Hagan*, 3 Howell 212 (1854), Report, p. 32 (navigable waters within state boundaries); (d) application of Article 7 (juridical bay) of the Convention, Report, p. 20 (citing Reply Brief for the United States, p. 30 in *United States v. Louisiana*, (1969), *supra*).

Sound qualifies as a juridical bay under Article 7 of the Convention on the Territorial Sea and Contiguous Zone. It further asserts that the presence of islands separating the Sound from the Gulf should be ignored or "conceptually erased" until the bay requirements are met. The effect of islands, it is said, is simply to mitigate against the rigors of the 24 mile limit on closing lines. Relying upon that fiction, the Government asserts that no part of the Sound can qualify as an "indentation" within the meaning of Article 7 unless Dauphin Island is treated as a continuation of the Alabama mainland, thereby forming a mainland headland. Even should Dauphin Island qualify as an extension of the mainland, which it denies, the United States further contends that the Sound should be dismembered by severing the eastern and western ends of the Sound as smaller juridical bays. The remaining central part of the Sound, it is argued, is no indentation at all, being nothing more than a fringe of islands fronting a relatively flat mainland shore which can be enclosed only by reliance upon Article 4 straight baselines which the Executive Branch has consistently declined to employ.[2]

The United States asserts that without treating Dauphin Island as a mainland headland there is no other way of satisfying the requirements of Article 7.[3] This argument

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2. By using bay closing lines to separate the two ends of the Sound as smaller juridical bays, the United States begs the question of whether those closing lines should be treated as part of the mainland shore in determining the depth of penetration and existence of an indentation for Article 7 analysis. (See discussion of closing lines as mainland under Article 7, *infra*, pp. 20-22).

3. Contrary to the Government's suggestion, the Special Master did not share the same conclusion. Mississippi had argued that regardless of the treatment of Dauphin Island as a mainland headland, the Sound nevertheless met the requirements of Article 7, including the 24 mile bay closing line. Having found Dauphin

(Continued on following page)

reflects a misunderstanding of the concept of "natural entrance points" set forth in Article 7 of the Convention and the theory by which a headland is permitted to be located on an island. Treatment of an island as a mainland headland is premised upon the fact that certain islands may be so closely aligned with the mainland as realistically to be considered an integral part of it. Such an island is treated as though it were continuous with the mainland shore, and the intervening waters are assimilated for all intents and purposes to the mainland regime. (See *United States v. Louisiana*, 394 U.S. 11, 62, n. 83). This headland theory as adopted by the Court supplements the provisions of Article 7. In certain instances it may permit an island which projects seaward to form the side of a bay even though it would otherwise lack natural entrance points and fails to qualify for treatment under Article 7. In this context, the Court has observed the distinction between islands which create multiple mouths to an indentation and those which by their close association with the mainland are deemed mainland headlands:

> No language in Article 7 or elsewhere positively excludes all islands from the meaning of 'natural entrance points' to a bay. • • •
>
> Moreover, there is nothing in the history of the Convention or of the international law of bays which es-

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Footnote continued—

Island constitutes a continuation of the mainland, the Master noted:

> The states contend that even if Dauphin Island is not considered a part of the mainland, then the eastern natural entrance point of Mississippi Sound is Cedar Point, and therefore the total closing line distance is still less than 24 miles (Stipulation Nos. 1 and 7) . . . . In view of my finding as to Dauphin Island, it is unnecessary for me to pass upon these contentions. (Report, p. 18, n. 7).

tablishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the mainland and that islands off the shore are not headlands but at most create multiple mouths to the bay.

Article 7, on the other hand, recognizes that coastal waters may be enclosed by offshore islands, and that such islands together with the mainland shore may form more than one entrance to an indentation by creating "multiple mouths" which are in turn defined by reference to lines connecting the "natural entrance points" located on each of the islands. The effect of islands in creating natural entrance points is explored at greater length in Mississippi's Exceptions and Brief, pp. 29-34.

Mississippi Sound is a classic example of islands which form multiple mouths to an indentation. A map of the Sound shows the area to be an enclosed arm of the sea bounded on the north, east, and west by mainland. To the east the Sound is separated from the open Gulf of Mexico by a series of barrier islands and intervening passes with the islands occupyin, more than fifty percent (50%) of the boundary with the Gulf. For purposes of this litigation, the parties agree that Mississippi Sound meets the semicircle test of Article 7(3) (Stipulation No. 9); that the water gap distances between Isle au Pitre, Louisiana, and Dauphin Island, Alabama total 21.7346 nautical miles (Stipulation No. 6); and that the pass between Dauphin Island and Cedar Point, Alabama is no greater than 1.6 miles (Stipulation No. 7).

A. The Mississippi Barrier Islands Create Multiple Mouths to the Sound and Define the Area of an Indentation.

The United States contends that the Sound is not a bay at all. It advances the argument that Article 7 takes islands into account only where a pre-existing bay-like indentation is established. It says that the barrier islands which clearly create multiple mouths to the Sound must be "conceptually erased" for verifying the character of the Sound as an indentation. Disregarding those islands, the United States submits that no "indentation" exists and that the mainland shore of the Sound is a gentle curvature of the coast and provides no justification for applying the rules for islands forming multiple mouths.[4] The absurd consequences of the Government's argument is plain to see in the case of the Mississippi Sound where the failure to properly apply Article 7 could leave three large enclaves of high seas within the territorial boundaries of the State of Mississippi. As Justice Holmes has observed, "a fiction [should] not [be] allowed to obscure

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4. In its Reply Brief in *United States v. Louisiana*, (1969), the United States distinguished the treatment of Mississippi Sound as inland waters from the configuration of "outer Vermillion Bay" by characterizing the Mississippi barrier islands as "islands in the mouth of an indentation." It argued: "Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation—an entirely different matter. Mississippi Sound, referred to by Louisiana, is such a situation." (p. 30, Exhibit J-66).

Moreover, G. Etzel Percy, then Geographer for the State Department, writing in the June 29, 1959 *Bulletin of the State Department* patently considered Mississippi Sound to constitute a well-marked indentation when he stated:

> Bays, because of the placement of islands in the vicinity of their entrances, may have several channels of ingress . . . . Situations of this kind abound along some portions of the coast. The one of most impressive dimensions is Mississippi Sound, partially closed off by a series of sandy islands. (p. 965).

the facts, when the facts become important." *Blackstone v. Miller*, 188 U.S. 189, 204 (1903).

Suffice it to say at this juncture that the Government's analysis is the result of importing ambiguity in its reading of the Convention where none exists. Quite expressly, Article 7(3) describes the role of islands in defining the area of an "indentation." It defines the term "indentation" by circumscribing the area which it is to occupy. In this respect, Article 7(3) provides, *inter alia*:

> For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

This Court has concluded that the lines drawn across the various mouths are to be the baselines for all purposes. *United States v. Louisiana*, (1969), p. 55. In this context, the Court further held:

> There is no suggestion in the Convention that a mouth caused by islands is to be located in any manner different from a mouth between points on the mainland—that is, by 'a line joining the low-water marks of natural entrance points.' (p. 56).

In its subsequent discussion of islands creating natural entrance points, the Court concluded that the fact that the indentation is defined in terms of the "low-water mark around the shore" does not necessarily mean the low-water mark must be continuous. *United States v. Louisiana*, (1969), p. 61. The conclusion is inescapable that islands play an important role in defining the limits of

the indentation since the low-water marks along the shores of the mainland and islands together with the lines joining the natural entrance points of the multiple mouths form the perimeter of the indentation.

Mississippi contends that the initial and dispositive inquiry in determining the existence of an indentation under Article 7 is whether the barrier islands can be said to create multiple entrances to the enclosed waters of Mississippi Sound. That inquiry is one of fact. In *United States v. Louisiana*, (1969), the Court noted:

> The United States argues—in addition to its contention that it does not meet the semicircle test—that 'Ascension Bay' is not a true bay because it is a 'mere curvature of the coast' rather than a 'well-marked indentation' containing 'landlocked waters.' . . . Whether an indentation qualifies as a bay under the criteria of Article 7 other than the semicircle test is a *factual question* which should be submitted to the Special Master in the first instance. (394 U.S. 11, 48, n. 64). [Emphasis supplied].

The Master[5] concluded that the Sound met the 24 mile closing line test for a bay. Implicit in that conclusion was the finding that the intervening passes between the barrier islands formed multiple mouths to the Sound and that it qualified as an indentation. The Master personally viewed the area, received the exhibits, and had the benefit of expert testimony regarding the influence of the barrier islands. Under these circumstances, the Master's findings are not clearly erroneous, but, to the contrary, are fully consistent with the requirements of Article 7 and opinions

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5. Special Master Armstrong has served in the capacity of Master in Submerged Lands cases for the past fifteen (15) years beginning with his appointment in *United States v. Louisiana*, (1969).

of this Court. It is therefore submitted that the Master's factual findings that Mississippi Sound is a well-marked indentation should be affirmed.

Contrary to its earlier position,[6] the United States currently contends that the Mississippi barrier islands are islands in the open sea and should neither be permitted to form multiple mouths or entrances into the Sound nor be considered as forming a part of the perimeter of the enclosed waters. The mainland shore, it is said, is at best a "gentle curvature" and no bay-like indentation at all. To qualify as an indentation for which islands may create multiple mouths, the Government argues the indentation must be wholly within the mainland coast and have well-marked mainland headlands such that it may be deemed to lie *inter fauces terrarum*.[7]

A map of the area shows that the Louisiana Marshes of which Isle au Pitre is concededly a part form a prominent cape or headland on the west. To the east, however, the Government would dismiss not only Dauphin Island but Mobile Point and Cedar Point as forming part of an indentation which would include Mississippi Sound. It states that Mobile Point is a headland for Mobile Bay which must be treated independently as a separate indentation and, therefore, cannot form a headland for Mississippi Sound; moreover, it points out that the water distance between Mobile Point and Isle au Pitre would exceed the 24 mile limit for bays. Likewise, it is argued that Cedar Point is a headland for Mobile Bay but not to the Sound to the west, and unless Dauphin Island qualifies

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6. See footnote 2, *supra*.

7. The International Court of Justice in its opinion in the *Fisheries Case*, ICJ Reports 116, 130, recognized that waters between islands or islands and the mainland lay *inter fauces terrarum*. Also see discussion of effect of islands in forming part of an indentation. Mississippi Exceptions and Brief, pp. 30-31.

as an extension of the mainland the Sound lacks the natural entrance points necessary to establish a mouth or form part of an indentation. The fiction thus advanced by the United States cannot conceal the geographic facts. Those facts establish that the Mississippi mainland shore is recessed an average of approximately ten (10) miles from the general trend of the coast between Florida and Alabama to the east and the St. Bernard Parish in the Louisiana Marshes.

The United States in its search for a pre-existing indentation rejects the provisions of Article 7(3) that islands which form multiple mouths to an indentation be taken into account in circumscribing the area of the indentation. It says the first step in defining the indentation is to detach any interconnecting tributary bays which cannot reasonably be deemed parts of a single, unitary indentation. (See subsection C, *infra*, p. 23; also see 394 U.S. 11, 51 and Report, p. 10, n. 7). The tributary bay is closed with a closing line joining the natural entrance points of its mouth, and the closing line together with the low-water mark along the shore forms a part of the perimeter of the indentation. (Article 7(3)).

Consequently, Mobile Bay must be deemed a separate indentation from Mississippi Sound inasmuch as the channel of communication between the two areas is so narrow that it cannot reasonably be said that they form a single, unitary indentation. The closing line is drawn between the northeastern tip of Dauphin Island and Cedar Point. That closing line has the same effect in forming the perimeter of an indentation as the low-water line along the mainland shore. The fact that Dauphin Island is actually connected to the mainland by a closing line is not addressed by the Government in its argument. To the contary, the

United States asserts that Dauphin Island cannot be considered to form a part of an indentation which would include Mississippi Sound unless the island can realistically be treated as a continuation of the mainland. Again, the Solicitor General appears to confuse analysis under Article 7(3) with the supplemental theory of mainland headlands.

Dauphin Island helps constitute Mississippi Sound as a well-marked indentation under Article 7 by two separate analyses: first, that it forms a part of an indentation with the mainland shore as a consequence of the closure of Mobile Bay to the east as a separate bay from Mississippi Sound; and, second, that the island together with the remaining Mississippi barrier islands create multiple mouths to the Sound. Aside from a straightforward analysis under Article 7, the Special Master correctly concluded Dauphin Island also constituted an extension of the Alabama mainland. His finding in that respect is treated in Subsection B. It is enough at this point to note that treatment under Article 7 reaffirms the Master's treatment of Dauphin Island as forming part of a well-marked indentation.

The United States, nevertheless, persists in its assertion that Article 7(3) does not permit natural entrance points to be located on islands (*i.e.* form multiple mouths or "well-mark" an indentation) unless the islands can realistically be treated as a mainland headland. One exception to the rule is admitted for islands which form multiple entrances or mouths to a pre-existing bay. Although the State of Mississippi disagrees with the Government's analysis as explained herein and in its Exceptions and Brief, pp. 17-39, it is submitted that even under that analysis Dauphin Island establishes the Sound as a well-marked indentation regardless of its treatment as a mainland headland.

The Special Master in making his findings of fact stated:

> Dauphin Island is directly in the mouth of Mobile Bay, which is admittedly a juridical bay. Its closing line as established by the Baseline Committee extends westward from the western extremity of Dauphin Island to Little Dauphin Island, thence along the northeast coast of Little Dauphin Island to North Point, thence to Cedar Point. (See Nautical Chart 11376, Joint Exhibit 1). It appears to be agreed that all waters north of this line are inland waters. Thus, Dauphin Island at least touches upon (and, if Little Dauphin Island is considered a part of it, is substantially coextensive with) inland waters of the state of Alabama. (Report, p. 14).

Dauphin Island extends westwardly from Mobile Bay approximately 14.75 miles roughly paralleling the mainland coast to the west of Cedar Point and separating the waters of the eastern part of the Sound from the open Gulf to the south. (Report, pp. 16-17). Dauphin Island by forming multiple mouths to Mobile Bay comes squarely within the exception recognized by the Government and is accorded a special status which permits natural entrance points to be located on it for purposes of drawing closing lines to Mobile Bay. Its special status is not diminished with respect to Mississippi Sound which it partially encloses. There it also forms the easternmost natural entrance point to Mississippi Sound and well-marks its character as an indentation.

The remaining barrier islands together with the natural entrance points on Isle au Pitre and the western tip of Dauphin Island create multiple mouths to enclosed waters to the north. The lines joining the natural entrance points together with the low-water marks along the main-

land shore and islands confirm the Sound as a "well-marked indentation containing landlocked waters."[9]

B. Dauphin Island Is an Extension of the Alabama Mainland.

As discussed in the foregoing section, the State of Mississippi has asserted that Mississippi Sound constitutes a juridical bay regardless of the treatment accorded Dauphin Island as an extension or headland of the mainland. In view of his finding that Dauphin Island qualified as a mainland headland, the Master found it unnecessary to address that alternative argument. (Report, p. 18, n. 7).

While treatment of islands as a part of the mainland territory of a nation is not entirely new under international law[10] or American jurisprudence,[11] the Court in *United States v. Louisiana*, (1969) first adopted the concept to supplement the provisions of Article 7 of the Geneva Convention on the Territorial Sea and Contiguous Zone. The Court recognized that under Article 7 the role of islands is generally restricted to that of creating multiple mouths to a bay.[11] The Court went on to hold that nothing in the

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8. It is stipulated that the water gap distances between the entrances to the Sound are less than 24 miles and that it meets the semi-circle test. (Stipulations 6, 7, and 9).

9. See *United States v. Louisiana*, 394 U.S. 11, 84, n. 84.

10. See *Louisiana v. Mississippi*, 202 U.S. 1, 43-46.

11. Article 7(3) of the Convention does not employ the term "bay" since that is a conclusion to be subsequently verified by application of the semi-circle test. Instead, it uses the term "indentation". Although a bay is by definition an indentation, the reverse is not necessarily the case. Neither does Article 7(3) refer to islands in or at the mouth of an indentation. Rather in precisely chosen language it provides: "Where, because of the presence of islands, an indentation has more than one mouth, . . ." [Emphasis supplied]. Had the drafters of the Convention intended the language to limit consideration of islands to situations

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Convention or elsewhere prevented an island from being considered in effect a continuation of a mainland formation. In referring the matter to the Special Master, the Court stated:

> While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as a part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast. We leave to the Special Master the task of determining in the first instance—*in light of these and any other relevant criteria and evidence he finds helpful to consider*—whether the islands which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention on the Territorial Sea and Contiguous Zone. (394 U.S. 66). [Emphasis supplied].[12]

Footnote continued—

in which they "lay at the mouth of a pre-existing bay or indentation" they would have stated so. Nothing in the *travaux* to the Convention suggest so narrow a construction. (See Mississippi's Exceptions and Brief, pp. 17-39). The important factual consideration recognized by Article 7(3) is not whether islands lie along a direct closing line connecting mainland headlands (*i.e.* "at the mouth (singular) of an indentation"). The language of Article 7(3) refers not to a singular pre-existing mouth of an indentation but to islands creating "more than one mouth," (*i.e.* mouths).

12. For a discussion of the term "coast" as it is used in the Convention and the understanding of its meaning by the Drafters of the Convention see Mississippi's Exceptions and Brief, pp. 34-39. Generally the term was understood to have been employed in the same sense as in the *Fisheries Case*, ICJ Reports, p. 116 (1951) to include the mainland shore, islands, and the limits of internal waters. (Cf. "Coastline" as defined in the Submerged Lands Act, 43 U.S.C.A. §1301(c); also see 394 U.S. 11, 64, n. 84).

The Court has not, as the United States would suggest, limited application of the headland theory to deltaic formation. Had the Court so desired it would have had ample opportunity to do so. The Court did observe:

> We do believe, however, that the origin of the islands *and their resultant connection with the shore* is one consideration relevant to the determination of whether they are so closely tied to the mainland as realistically to be considered a part of it. (394 U.S. 11, 64, n. 84, last paragraph). [Emphasis supplied].

The Master addressing each of the factors adumbrated by the Court concluded that Dauphin Island should be treated as a part of the mainland and thereby confirmed the Sound's character as an "indentation."

The Government urges that the Master is wrong in his ultimate factual finding, and inasmuch as the mass of underlying facts were not disputed, the Master's Report should be accorded no deference. His error it is said is one of law rather than of fact. That argument is an invitation for this Court to weigh the evidence once again and make a new factual finding in favor of the United States.

First and foremost among the Government's argument is that because other islands in other cases have been rejected as extensions of the mainland so must Dauphin Island.[13] It is clear from the factors identified by the

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13. In particular, the United States claims that the Court's decree in *United States v. Florida*, 425 U.S. 791 (1975), rejected the Florida Keys as extensions of the mainland. The Government's assertion is without foundation. It will be recalled that Special Master Maris in his Report filed January 18, 1974 specifically found the upper Florida Keys to constitute an extension of the mainland. (Report, p. 39). The United States took exception to that finding.

(Continued on following page)

Court that each island or group of islands should be judged on a case by case basis.

The United States contends that Dauphin Island's shape and size do not support the Master's finding. The island it is said, is "long and narrow." (Exceptions and Brief, p. 8). The Master considered the island's size but noted size itself is not dispositive but must be considered in relation to its shape, orientation, and distance from the mainland. (Report, p. 16). He noted in this respect

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Footnote continued—

This Court, noting that the recommendations of the Master had been made without the benefit of the arguments presented for the first time by way of exceptions, referred the exceptions to the Master for his consideration and the filing of a supplemental report. (See *United States v. Florida*, 420 U.S. 531 (1975)). In his Supplemental Report submitted December 30, 1975, the Master indicated that following that referral to him the parties reached a negotiated settlement of the issues involving the exceptions of the United States. The argument was reduced to a written stipulation and attached to the Master's Supplemental Report. The Court adopted a modified version of the written stipulation as the body of its decree. (*United States v. Florida*, 425 U.S. 791).

Even so, Paragraph 6 of the decree does not reject the Keys as extensions of the mainland but simply states, *inter alia*:

> There are no inland waters within Florida Bay, or within the Dry Tortugas Islands, the Marquesas Keys, and the lower Florida Keys (from Money Key to Key West), *the closing line of which affects the right of either the United States or the State of Florida under this decree.* [Emphasis supplied].

The written stipulation employed somewhat different wording in that it provided:

> . . . there are no inland waters within the lower Florida Keys . . . whose closing lines affect the seaward limit of Florida's Submerged Lands Act grant.

A similar provision was included in the stipulation respecting the Upper Florida Keys but was not included in the final decree. It is significant to note that Florida's territorial waters under the Submerged Lands Act extend three (3) leagues from the coasts of the mainland and islands. Waters between the mainland and islands no more than 21 miles (3 leagues) offshore would therefore belong to Florida regardless of the treatment of the area as inland waters.

that the island extended from east to west and "appears from its shape and orientation to be an elongation of Mobile Point" to the east to which it appears to have been connected in the Holocene era. The configuration of Dauphin Island, he stated, follows the curvature of the shoreline with the exception of the projection of Cedar Point 1.6 nautical miles to the north. (Report, pp. 16-17). The Master might well have noted that the eastern end of Dauphin Island appears to be a projection not only of Mobile Point but also of Cedar Point as well. Moreover, the orientation of the island is such that it shelters and encloses the eastern end of the Sound for approximately 14.75 miles (Report, p. 16) thereby linking the waters to the north more closely with the mainland shore to the north. (Also see Commentary to Article 7 prepared by the International Law Commission 2 Y.B. Int'l. L. Comm'n. 269 [1956]).

The United States claims that the fact that Dauphin Island as a whole appears to lay at right angles to Cedar Point somehow detracts from its role as an extension of the mainland. As noted above, however, the Master viewed the island as a flat continuation of Mobile Point. Moreover, the northern hook of Dauphin Island projects toward Cedar Point to the north.

The Master found the depth of the waters between the northern tip of Dauphin Island and Cedar Point to be no greater than six (6) feet except in the dredged channel.[14] He found as a practical matter that the waters could not be utilized by international shipping. The United States, however, asserts that the depth aside from the dredged channel is "some seven feet deep." It urges

14. The Intracoastal Waterway is not a natural channel but is dredged and maintained by the Corps of Engineers. The project depth of the waterway is only twelve (12) feet.

that the Master disregarded the depth of the Intracoastal Waterway simply because it was a dredged channel. Nothing, however, in the Master's Report indicates that he disregarded the channel. To the contrary, he specifically mentions the channel. The fact that the water may be seven (7) or even twelve (12) feet does not detract from his conclusion that the waters are so shallow that they are not navigable by international shipping.

The United States points to the Master's statement that the water distance from Dauphin Island to Cedar Point, 1.6 miles, appeared to be greater than was contemplated by the Court. However, nothing in the Court's list of factors would appear dispositive in a given case. Each factor must be weighed in the context of the remaining factors and any others which may reasonably be regarded by the Master as having a bearing on the outcome. Moreover, distance is relative to the size of the island, the depth of water, and the relation to the mainland. Although the Court in its treatment of mud-lumps and low-tide elevations might have viewed 1.6 miles as excessive, in the context of Dauphin Island, with its other factors, it is submitted that the distance is insignificant. Moreover, the island, known as Massacre Island in the late seventeenth century, was perceived by early explorers sailing along the coast as being connected to the mainland.[15]

As the Master found, Dauphin Island is connected by a highway bridge from the northern tip of Dauphin Island to Cedar Point. He declined, however, to find that fact conclusive. The Master appears to have relied

15. For instance, in 1699, d'Iberville sailing west from Mobile Bay recorded his observation. Viewing "Massacre Island" from his ship, he noted that it appeared to be attached to the mainland (no doubt at Cedar Point). (Testimony of Patricia Galloway, Transcript, p. 333).

upon the arguments of the United States that the decree in *United States v. Florida*, 420 U.S. 531 (1975); 425 U.S. 791 (1975), denied the Florida Keys the status of a mainland extension. (See footnote 13, *supra*). The decree in that case did not address the upper Florida Keys nor did it deny the lower Keys the status as extensions of the mainland. Likewise, the ruling in *United States v. California*, 447 U.S. 1 (1980), related to an entirely different question of whether a pier should be deemed a part of the "coast" under Article 8 of the Convention (harbour works). Nevertheless, the Master did take note of this Court's observation respecting treatment of the Florida Keys as mainland due, in part, to their connection by a permanent highway. (See 394 U.S. at p. 72, n. 95 final sentence).

It would appear that the Court may well have had in mind permanent highways and bridges connecting islands when it noted its belief that the "origins of the island and their *resultant connection with the shore*" may have a bearing on the treatment of islands as mainland headlands. [Emphasis supplied].

The Master noted the origin of Dauphin Island as a part of the mainland shore to the east and north. Likewise, he considered the alluvial nature of the island which developed around the mainland core. (See Report, p. 17). The United States surmises that the Master could not have accorded significant weight to the fact that, in prehistory, Dauphin Island was once a part of the mainland. The fact is the Master considered those facts as a basis for his finding.

Finally, the United States asserts that the dispositive factor for the Master was the "unique and significant" circumstance that Dauphin Island is at the mouth of Mobile Bay. The Master, however, considered that fact

only in the context of his findings as to the island's distance from the mainland. Thus, the Master's conclusion rests upon several other additional considerations.

The United States asserts that the Special Master's treatment of internal waters as mainland is without foundation and has never been endorsed by the Court or any commentator.[18] The State of Mississippi asserts that both the rulings of this Court and the Convention support the Master's conclusion.

In his Report, the Special Master states:

> There seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland. If this is correct, then Dauphin Island, as it adjoins the mainland, is clearly an extension thereof . . . . (Report, p. 14).

In *United States v. Louisiana*, 394 U.S. 11, 22 (1969), the Court stated:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory. . . .

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18. The United States contends that the Master's finding is irreconcilable with his rejection of Louisiana's "leap-frog argument" in *United States v. Louisiana*, (1969). The factual situations there were significantly different than here. The mud-lumps and islands failed to qualify as headlands for delimiting inland waters. The Master, having once established the area as bays, cannot be faulted in his refusal to reconstitute the bay by incorporating mud-lumps or islands near the closing line but which did not create multiple mouths to the bay.

The inland or internal waters of a nation, as the very terms suggest, are within the "coast" or mainland regime of the nation. Such waters by definition must be sufficiently closely linked to the land domain to be subject to the concept of internal waters. These were, of course, the principles upon which the *Fisheries Case*, *supra*, and the Convention on the Territorial Sea and Contiguous Zone are based.

Article 1 of the Convention states, *inter alia*:

> The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt sea adjacent to its coast, described as the territorial sea.

The Convention initially states the general understanding of its drafters that the term "coast" applied not only to a nation's land territory but to its internal waters as well. Thus, in depicting the baseline for the territorial sea bay closing lines are deemed a part of the coast just as is the land territory. This conclusion is confirmed by Article 3 which provides that the normal baseline for measuring the territorial sea is the low-water mark along the coast. Bay closing lines are also deemed part of the coast. The Court in the *Fisheries Case*, *supra*, p. 127 considered the term "coast" to include the mainland shore, offshore islands, and internal waters. (See discussion in Mississippi's Exceptions and Brief, pp. 34-39). In this context, this Court has concluded that bays are recognized as indentations in the "coast" (*United States v. Louisiana*, 394 U.S. 67 (1969) and that the terms "coast" and "mainland" were considered synonymous.

Article 11 of the Convention provides that low-tide elevations situated wholly or partly within the territorial sea as measured from the "mainland" generate their own territorial seas. In *United States v. Louisiana*, (1969),

the Court addressed the proper construction of Article 11. It held:

> It is clear that under the International Law Commission version of Article 11, the 'territorial sea, as measured from the mainland' included those portions which extended from baselines enclosing bays. The sole purpose of the amendment to the initial proposals was to indicate that 'drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leap frogging, as it were from one rock or shoal to another.'
>
> The United States contends that by changing the language of the International Law Commission draft to its present form in the Convention, the Geneva Conference intended also to change its meaning. Precisely the opposite conclusion, however, flows from an inspection of the history of the Convention. The amendment was advanced by the United States; yet *its explanation for the proposal contained not the slightest indication that any change in the basic meaning of the Article was intended*. Surely there would have been some discussion of the reference to the territorial sea as a measure of distance rather than as a situs had it been the purpose of the United States or the Conference to alter so significantly the meaning of prior drafts and the existing internation consensus. (394 U.S. 46). [Emphasis supplied].

In an accompanying footnote, the Court stated:

> The United States argues that its construction of Article 11 is supported by the failure of the International Law Commission to adopt a proposal of the United Kingdom to insert after the words 'territorial sea' the phrase 'as measured from the low-water

mark or from a base line.' [Citations omitted]. *The preference of the Commission for the phrase 'as measured from the mainland' to the British terminology, however, is consistent with the view that the phrases were thought to have the same meaning.* (394 U.S. 45). [Emphasis supplied].

Moreover, there is nothing in the Convention which suggests that the "coast" (*i.e.* mainland) must be dry land. Common sense suggests that a river which empties into the sea is just as much a part of the main continent as its banks on either side. A closing line drawn across its mouth would certainly be deemed the limit of the mainland territory. (See Article 13).

Were the foregoing not ample evidence of the treatment of internal waters as part of the "mainland" or "coast", the opinions of this Court further confirm the point.

In its discussion of islands as extension of the mainland, the Court pointed out the effect on the intervening waters. It stated:

> These arguments [of the United States], however, misconstrue the theory by which the headland is permitted to be located on the island—that the island is so closely aligned with the mainland as realistically to be considered an integral part of it. *Thus viewed, there is no 'mouth' between the island and the mainland.* (394 U.S. 62, n. 83). [Emphasis supplied].

The Court not only assimilates the island to mainland but the intervening water as well, such that a bay closing line is not required to be drawn from the island to the mainland shore.

Similarly, in its analysis of Article 7, the Court has recognized that tributary bays may be closed off from a

larger indentation where the two cannot reasonably be considered a single unit. The closing line so drawn is substituted for the low-water mark around the shore used in creating an indentation. In such fashion the internal waters of a separate tributary bay are deemed to be mainland for purposes associated with delimitation and sovereignty.

C. Mississippi Sound Constitutes a Single Indentation.

Mississippi Sound joins Mobile Bay on the east through a narrow strait between Dauphin Island and Cedar Point, Alabama. Lake Borgne is a tributary bay adjacent to the Sound at its western extremity. This western portion of Mississippi Sound and Lake Borgne penetrate deeply into the mainland. Likewise, the eastern end of the Sound forms a pronounced concavity in the mainland coast if Dauphin Island is considered an extension of the Alabama mainland.

In the alternative, the United States contends if Dauphin Island is deemed a part of the mainland the Master erred by focusing his attention upon the Sound as a single unit. It is argued that the Master in selecting the natural entrance points should have recognized two distinct and unconnected bays: one on the west comprising Lake Borgne and that portion of Mississippi Sound enclosed by a line extending from Isle au Pitre to the mainland on the north; the other to the east by a line drawn from the western terminus of Dauphin Island and Point Aux Chenes on the Mississippi mainland.[17]

The Court in *United States v. Louisiana*, 394 U.S. 11, 50-52 (1969) addressed the same question in its discussion

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17. This argument is advanced by the United States for the first time by way of Exception.

of Vermilion Bay as a tributary bay to "Outer Vermilion Bay". The Court, noting the United States' argument there, stated:

> The United States does not reject the notion that some indentations which would qualify independently as bays may nonetheless be considered as part of larger indentations for purposes of the semicircle test; but it denies the existence of any rule that all tributary waters are so includable. (p. 51).

The Court agreed and held:

> The inner bays can be included, therefore, only if they can reasonably be considered part of the single outer indentation, and that cannot be said of inland waters which, like Vermilion Bay and Barataria Bay—Caminada Bay, are wholly separated from the outer body of water and linked only by narrow passages or channels. (At 51).

With respect to the treatment of interconnecting indentations it stated:

> 'Outer Vermilion Bay,' if it is to qualify under the semicircle test, must include the waters of Vermilion Bay. Yet Vermilion Bay is itself a part of the much larger indentation which includes West and East Cote Blanche Bays and Atchafalaya Bay, and which opens to the sea between Marsh Island Point au Fer. Recognition of the unitary nature of this larger indentation follows from Louisiana's insistence that the low-water mark must be followed around the entire indentation. (p. 52).

The test again is one of fact. Although connecting indentations might qualify as separate bays if considered independently, the test is whether the entrance between the two water bodies is so narrow that they cannot reasonably

be deemed parts of a single, unitary indentation. In those instances, the tributary bay is closed by a closing line with the result that in tracing the low-water mark along the shore of the outer indentation waters so closed off will be deemed mainland.[18]

When applying the foregoing test it is clear that Mobile Bay must be treated as a separate and independent indentation since it is connected to the Sound by a narrow channel between the northern tip of Dauphin Island and Cedar Point.

Neither of the "smaller" bays proffered by the United States meet the test established by the Court for excluding a bay from that of a larger unitary indentation. Neither of the suggested closing lines between Isle au Pitre and the Mississippi mainland to the north or the closing line between the western terminus of Dauphin Island and Point Aux Chenes on the mainland to the northwest are justified by the geographical facts. There is no noticeable constriction of the Sound in either instance. The Sound averages approximately ten (10) miles in width broadening to a greater distance in its western extremity. (See diagram appended as Chart 3 to the Exceptions and Brief of the United States). The only justification which the United States gives for dismembering the Sound by forming sub-bays is that "it seems natural" to do so. (Exceptions and Brief, pp. 16-17). The State of Mississippi submits that argument is not only contrary to the language of Article 7 and the direct precedent of this Court, but also contrary to the very arguments which the United States espoused in its boundary dispute with Louisiana in 1968. (See Brief

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18. In the context of Article 11, the Court has previously concluded that the International Law Commission which prepared the draft Convention considered the terms "baseline" and "mainland" as having the same meaning. 394 U.S. 11, 43 especially n. 58.

the Master's finding that the United States prior to the effective date (September 10, 1964) of the Convention on the Territorial Sea had adopted a policy of enclosing as internal waters those areas between the mainland and offlying islands which were so closely grouped that no entrance exceeded ten (10) nautical miles in width. (Report, pp. 41-44 and 48-54).[21]

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21. See Shalowitz, *Sea and Shore Boundaries* (1962), Vol. I, pp. 112 and 161. Similarly, in its Brief for the United States in *United States v. California*, (1965), the Government distinguished its treatment of Santa Barbara Channel from that of Chandeleur Sound in stating:

> California attempts to analogize the Santa Barbara Channel to Chandeleur and Breton Sounds, in Louisiana, which the United States has recognized as inland waters (Brief, 33-34, n. 14; 82; 106-108). For present purposes, it is enough to observe that the widest entrances into Chandeleur and Breton Sounds are six miles, between Breton Island and Bird Island, and slightly less than ten miles, between Ship Island and the northernmost tip of the Chandeleur Islands. See U.S. Coast & Geodetic Survey Chart No. 1115. Thus, our concession as to Chandeleur and Breton Sounds involved no breach of the ten mile limit. Other aspects of California's analogy are discussed *infra*, pp. 153-155. (At p. 113).

Likewise, in its Brief for the United States filed in *United States v. Louisiana*, (1969), the Government further stated:

> Prior to the Convention there was no international consensus, but the United States had taken the position that such areas were inland waters at least in some circumstances. Accordingly, in all proceedings in this case and its predecessor prior to 1964, we treated Chandeleur and Breton Sounds as inland waters.
>
> The 1965 decision in *United States v. California*, 381 U.S. 139, holding that the baseline is to be drawn in accordance with the 1961 Convention, showed our assumption to be wrong. Nevertheless, we do not now claim for the United States the areas previously assumed to be inland waters, because we think it would not be in the public interest to upset, at this date, a postulate that has guided the conduct of both parties and their lessees in a large area over a long period of time. But since the concession related to specific areas and was expressed in geographic terms, we should not be precluded from relying upon the Convention in resisting Louisiana's effort to add adjoining waters, never within the concession, to those we are willing to conceded. (pp. 121-123).

(Continued on following page)

for the United States, pp. 59, 103-104 in *United States v. Louisiana*, (1969)).[19]

II. MISSISSIPPI SOUND CONSTITUTES HISTORIC INLAND WATERS.

The United States admits the Master's findings of fact, but denies the legal significance of those facts in supporting a claim to Mississippi Sound as an "historic bay". (Exceptions and Brief for the United States, p. 20). It states in this respect:

> Here, also, only the Master's legal reasoning is implicated; and the Court can assess the correctness of his conclusion without going beyond the facts recited in the Report itself. (p. 20).

Consequently, the State of Mississippi will not attempt to lay before the Court the wealth of documentary evidence available to the Special Master. Suffice it to note that the Master found as a matter of fact that the United States accepted Mississippi Sound for more than a half century as inland waters. (Report, pp. 53-54; also see footnote 1, *supra*).[20] Neither does the United States take issue with

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19. In its discussion of subsidiary indentations, the United States stated:

> One suggestion is to apply the semicircle test first to each tributary area separately drawing the appropriate closing line for each one that meets the test, and then to count as part of the main indentation only those tributary areas that cannot be closed off from it as separate bays by this process. . . . That procedure may be unduly restrictive, as applied to open areas like West Bay that have some substantial unity with the outer area. (pp. 103-104).

20. The Master noted that although the states had historically exercised jurisdiction over the Sound, it was not of such nature as to form a predicate for an inland water claim since it was equally consistent with recognition of the Sound as inland waters or territorial waters. Accordingly, Mississippi will limit its discussion to those policies and actions of the United States which may form the basis of an historic bay claim.

The United States has abandoned its claims to the Sound as inland water, and now disclaims the effect of its earlier assertion of inland jurisdiction and sovereignty. Its disclaimer, arising as it does during the course of litigation, is ill-advised, unreliable, and at best self-serving. This Court in *United States v. Louisiana*, (1969), cautioned:

> The Convention was, of course, designed with an eye to affairs between nations rather than domestic disputes. But, as we suggested in United States v. California, it would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government *to distort these principles, in the name of its power over foreign relations and external affairs, by denying any effect to past events*. (p. 77). [Emphasis supplied].

In this respect the Court noted:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another *to allow the United States to prevent recognition of historic title which may already have ripened because of past events* but which is called into question for the first time in a domestic lawsuit. *The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in United States v. California.* (p. 77, n. 104). [Emphasis supplied].

Footnote continued—

Also see 1972 Charney Letter, respecting treatment of Chandeleur Sound as a "fictitious bay," Mississippi Exhibit 101 and November 13, 1951 Letter of Acting Secretary of State James E. Webb to the Attorney General, Subsection (f), Joint Exhibit 106; Report, p. 52).

A. Elements for a Claim to Historic Waters.

Article 7(6) of the Convention on the Territorial Sea states that the requirements relating to juridical bays have no application to "historic bays." In *United States v. Alaska*, 422 U.S. 184 (1975), the Court held that in order to establish its claim to a body of waters as an historic bay, a coastal nation must have traditionally asserted and maintained dominion with the acquiescence of foreign nations. The Court stated in this regard that three factors are significant in determining the historic bay status: they are: (1) the claiming nation must have exercised authority over the area; (2) that exercise must have been continuous; (3) foreign states must have acquiesced in the exercise of authority. Proper assessment of the legal significance of these factors depends upon the scope of the authority exercised, the acts by which the authority is exercised, the effectiveness of the authority exercised, the continuity of the exercise of authority, and the toleration and inaction of foreign nations. (See Juridical Regime of Historic Waters, Including Historic Bays, 2 Yearbook of the International Law Commission, 1962, pp. 1, 13-19). It is to those considerations we now direct our attention.

B. Scope of Authority Asserted.

The Special Master correctly found the Mississippi Sound was treated as inland waters by the United States' long standing policy of enclosing as inland waters sounds and straits which served as a channel of communication to an inland sea where none of the entrances exceeded the ten (10) mile rule. Moreover, he found the Sound had been specifically treated as inland waters by this Court in *Louisiana v. Mississippi*, (1905) and was conceded by the United States to be inland waters in *United States v. Louisiana*, (1960). In addition, this Court took note of that

concession in its opinion in the latter case. (363 U.S. 66, n. 108 and 82, n. 135). In its brief, the United States conceded:

> As in the case of Louisiana (*supra*, p. 177), we need not consider whether the language, 'including the islands' etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana v. Mississippi*, 202 U.S. 1, 48. The bed of these inland waters passed to the State on its entry into the Union. *Pollard's Lessee v. Hagan*, 3 How. 212.

The Solicitor General candidly admits:

> We cannot of course, avoid the point that in our 1958 Brief in Support of Motion for Summary Judgment on Amended Complaint, we construed *Louisiana v. Mississippi* as describing Mississippi Sound as inland water which therefore passed to the States on their entry into the Union. (Exceptions and Brief, p. 30).

He could have further noted that the United States was relying upon the authority of *Louisiana v. Mississippi*, in distinguishing its treatment of the Sound from the Chandeleur Islands as late as 1969. In its Brief in *United States v. Louisiana*, the Government stated:

> Nor does *Louisiana v. Mississippi*, 202 U.S. 1, support Louisiana. The opinion recognized Mississippi Sound as inland waters (202 U.S. 48), but did not so characterize Chandeleur or Breton Sounds or recognize Chandeleur Islands as part of Louisiana's coast. (p. 124).

The United States appears to argue that Mississippi's historic bay claim must fail because no Japanese fishing trawlers have been arrested or excluded from Mississippi Sound. (See Exceptions and Brief, pp. 21, 33). The absurdity of the Government's argument is amply demonstrated by the shallowness of the Sound. Only the shallowest draft coastal vessels and barges are suited to the interior navigation of the Sound. It, like Chandeleur Sound, is a *cul-de-sac*, not a route of international traffic. While exclusion of navigation might provide some evidence of exercise of authority over the subject waters, it is by no means an indispensible requirement as the United States suggests.

In *United States v. Alaska*, 422 U.S. 184 (1975), the Court found the routine enforcement of domestic fish and game regulations failed to provide adequate notice of a claim to the disputed areas as inland water. It stated:

> . . . the regulations were not commensurate in scope with the claim of exclusive dominion essential to historic title. Each afforded foreign vessels the same rights as were enjoyed by American ships. (422 U.S. at 198).

The Court also held:

> . . . [T]he exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation. The enforcement of fishing and wildlife regulations, as found by the District Court, was patently insufficient in scope to establish historic title to Cook Inlet as inland waters. (At 197).

In its discussion of "historic bays" the Court cited a study prepared by the United Nations Secretariate entitled "Juridical Regime of Historic Waters, Including

Historic Bays" (422 U.S. 200). That document provided, *inter alia*:

> The first requirement to be fulfilled in order to establish a basis for a title to 'historic waters' can therefore be described as the effective exercise of sovereignty over the area by appropriate action on the part of the claiming state. (2Y.B. ILC, 1962, p. 15) (UN Doc. A/CN.4/143).

The study further explains:

> *This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations with in or with respect to the area claimed.* It is not impossible that these laws and regulations were respected without the state having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken. (*Supra*, p. 15). [Emphasis supplied].

It is not essential, therefore, that the United States or the State of Mississippi resort to arrest of foreign vessels within the Sound to call attention to its claims or to prove acquiescence of foreign nations. Mississippi Sound, unlike Santa Barbara Channel or Cook Inlet, is generally non-navigable by ocean going vessels such that it is unnecessary for the United States to exercise its right of exclusion. Neither is the United States required to exercise all of the rights or duties which are included in the concept of sovereignty.

If the Master was correct, as it is submitted he was, in his factual finding that the policies and actions of the Federal Government constituted a claim to Mississippi

Sound as inland waters, that assertion of sovereignty is fully commensurate in scope with a claim of exclusive dominion, including the power to exclude any foreign vessel which might attempt for some unknown reason to enter the Sound. Such a claim is at the very heart of the theory of "historic bays."

C. Acquiescence by Foreign Nations.

The study of historic waters prepared by the United Nations Secretariate states as follows:

> In any case, nobody seems to demand that the coastal state formally notify each and all of the foreign States that it has assumed sovereignty over the area, before the time necessary to establish the usage begins to run. If that is so, the notoriety of the situation, the public exercise of sovereignty over the area, would in reality be sufficient. (p. 19).

Accordingly, arrest or exclusion of foreign vessels is significant only to the extent that it asserts an indisputable assertion of inland water status and sovereignty. Where there is no challenge to such a claim asserted by a coastal nation, other evidence of acquiescence may be sufficient to establish historic waters treatment.

The Special Master found that no foreign government has ever protested the United States' claim to Mississippi Sound as inland waters. In response to Mississippi's First Set of Interrogatories dated September 26, 1980, the United States filed a supplemental answer to Interrogatory No. 37. The interrogatory had asked the United States to identify any protests or opposition by any foreign governments to the treatment of the Mississippi Sound as inland waters. In its response, the United States answered:

The Department of State has no record of any such objection. (Supplemental Answer to Interrogatory 37, dated June 9, 1982).

With respect to the toleration and inaction of foreign governments, this Court stated in *United States v. Alaska*, (1975):

> Scholarly comment is divided over whether the mere absence of opposition suffices to establish [historic] title. [Citation omitted]. The Court previously has noted this division but has taken no position in the debate. [Citation omitted]. *In this case*, we feel that something more than mere failure to object must be shown. The failure of other countries to protest is meaningless unless it is shown that the governments of those countries knew or reasonably *should have known of the authority being asserted*. (p. 200).

The lack of opposition to the United States' claims is hardly surprising in view of the geography of the coast, the shallowness of the waters and inaccessibility of the Sound to international shipping, the absence of the international shipping lanes in the vicinity, and the fact that it leads only to United States territory. Moreover, the United States' claim could have been easily validated by the adoption of straight baselines. Any objection would under those circumstances be of little significance and affect no important freedoms and rights of the international community of nations or international users. On questioning by the Special Master at trial, Professor Bowett who testified on behalf of the United States stated that the fact that Mississippi Sound is enclosed by a continuous belt of territorial waters across its entrance strengthens any claims it may have to the waters as an historic bay. (Transcript, pp. 1881-1890).

Yet, assuming that something more may be required in this circumstance to establish that foreign governments "knew or reasonably should have known" of the United States' claim to the Sound, Mississippi contends that requirement has been met. The views of foreign countries are particularly strong evidence of the notoriety given to the United States' policy. Other nations have the strongest interest in clearly understanding the United States' policy in order to make known any objections they may have. Had the United States refused to recognize sounds formed by offshore islands and the mainland shore, it would be expected that the United Kingdom would have pointed out so significant a fact in opposing Norway's claims before the International Court of Justice in the *Fisheries Case*.

Perhaps the most significant evidence of the United States' policy and claims to inland waters is an Aide-Memoire from the State Department to the Norwegian government. The Norwegian Embassy had by a diplomatic memorandum dated September 9, 1949 made inquiry of the United States respecting its delimitation of inland and territorial waters.[22] In its Aide-Memoire the State Department stated, *inter alia*:

> The chief developments in the subject in the field [delimitation of territorial waters] of United States Federal legislation, executive pronouncements, and legal decisions since 1929, are as follows: . . . The Federal Government is now in dispute with the State of California with respect to the location of the boundary line between the territorial sea and inland waters.

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22. Approximately three weeks later on September 28, 1949, the United Kingdom filed its Application instituting proceedings before the International Court of Justice in the *Fisheries Case* (*United Kingdom v. Norway*, ICJ Reports 118 (1951)).

See U.S. v. State of California (decree of October 27, 1947) and case now pending before the United States Supreme Court.

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With respect to the demarcation of the line separating inland waters from the territorial sea, and to the geographic method of delimiting the territorial sea, the Embassy's attention is invited to the proposals made by the United States Delegation to the Hague Conference of 1930 with respect to the various Bases of Discussion of territorial waters there considered. (Exhibit J-115, pp. 1, 4-5).

Both at the Hague Conference in 1930 and in the proceedings before this Court, the United States had taken the position that waters between islands and the mainland forming sounds or straits should be treated as inland waters if the individual entrances did not exceed ten (10) nautical miles. (Compare letter dated November 13, 1951 from Acting Secretary of State James E. Webb to the United States Attorney General, Subsection (f), "Straits, particularly those situated between the mainland and offshore islands." Joint Exhibit 106: also see Proposal of the United States at the Hague Conference, Joint Exhibit 97, p. 201).

This policy of the United States was cited and discussed at length by both the United Kingdom and Norway in the *Anglo-Norwegian Fisheries Case* in support of their respective positions. In their briefs and oral arguments before the Court, Norway and the United Kingdom each pointed to the United States' practice of enclosing waters between offshore islands and the mainland as internal waters. The principal dispute between the parties was whether the individual openings between islands or islands

and the mainland should be limited to the ten (10) mile rule employed for bays. The opinion of the Court states that copies of the pleadings of the parties in that case were provided upon their request to the governments of Belgium, Canada, Cuba, Iceland, Sweden, Venezuela, and the United States. Following the entry of the Court's judgment, the pleadings of the parties were made accessible to the public. (*Fisheries Case*, ICJ Reports, p. 119 (1951)).

In its Contre-Memoire, Norway cited Secretary of State Seward's (1863) recognition of the Cuban cays as forming the exterior coastline of Cuba in support of its claims. (*Pleadings, Oral Arguments, Documents, Fisheries Case* (*United Kingdom v. Norway*) Vol. I, Para. 461-62, pp. 484-485). In this respect, Norway stated: "Autrement dit, le systeme American est le meme, a cet egard, que le systemen norvegien." (In other words, the American system is the same, in this respect, as the Norwegian system. (Para. 462, p. 486)). In its Reply, the United Kingdom stated:

> Certainly, the above passage concerning the Cuban cays indicates that the United States then recognized the possibility of islands by their particular configuration actually enclosing areas [as inland waters] of sea. But that is a very different thing from recognizing a right to establish a purely national enclosure of areas of seas by joining on the outside of the fringe arbitrarily selected points regardless of whether the areas are in fact enclosed by the physical formations. (*Pleadings*, Vol. II, Para. 332, pp. 535-536).

Both Norway and the United Kingdom cited in support of their positions the United States' argument in the *Alaskan Boundary Arbitration* (1903). (Vol. I, Para. 466, p. 477; Vol. II, Para. 336, pp. 538-539). The United Kingdom, referring to the argument of the United States, stated:

Having cited a passage from Hall's[23] *International Law* on the Cuban Archipelago de los Canarios and Lord Stowell's judgment in *Anna*, the argument proceeded with the following two sentences which are given in the Counter-Memorial:

> 'It thus appears that from the outer coastline of a maritime state, as defined in physical geography, is invariably measured under international law, the limit of that zone of territorial water generally known as the marine league. The boundary of Alaska—that is, the exterior boundary from the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands.'

It further stated that the United States had argued that the openings between the islands were less than ten miles. It observed that the brief of the United States had explained as follows:

> When 'measured in a straight line from headland to headland' at their entrance, Chatham Strait, Cross Sound, Sumner Strait, and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. (*Pleadings*, Vol. II, Para. 336, pp. 538-539).

The United Kingdom asserted that only straits and sounds which met the ten (10) mile rule qualified as inland waters. In this respect it stated:

> If a strait or sound between a mainland and an island (or a low-tide elevation inside the territorial belt) or between two islands, connects two parts of the open sea, the law of straits applies and each piece of territory has its own belt of territorial waters and its own baseline. If, however, the strait or sound lies between an island and the mainland and if it connects one part of the open sea, not with another part, but with inland waters, the law of bays applies, and the baseline may be joined at the nearest place to the seaward entrance where the interval does not exceed 10 miles in width . . . . *In case of doubt as to the status of a particular channel, the test is whether the channel would reasonably be used for coastwise navigation by international maritime traffic.* (*Pleadings*, Vol. I, Para. 112, pp. 78-79). [Emphasis supplied].

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23. It is significant that the Supreme Court in *Louisiana v. Mississippi*, 202 U.S. 1, 53, decided two years later in 1905, also relied upon Hall's treatment of the Cuban cays.

During its oral argument on September 27, 1981, the United Kingdom directed the Court's attention the proceedings in *United States v. California* which were then pending before the Special Master. It stated:

> It has been disclosed in hearings *before a Committee of Congress* that the Federal Government is maintaining before the master that the principles which the United States advocated at the 1930 Conference should be applied in drawing the boundary. (Pleadings, Vol. IV, p. 86). [Emphasis supplied].

It further argued:

> . . . my general point is that the Federal Government before the *Supreme Court* is vigorously maintaining the principles which it advocated in 1930, and that this fact is entirely inconsistent with the Norwegian Government's interpretation of the United States's practice. It is clear that the *Federal Government's views before the Supreme Court are perfectly in line with the United Kingdom's views in this Court.* (*Pleadings*, Vol. IV., p. 89). [Emphasis supplied].

Inasmuch as the United States' position was thus exposed to the world in the proceedings in the International

Court, the argument proffered to this Court that its policy was so unsettled as to ill afford the sort of notice upon which a claim to historic bays is based lacks credibility. Undaunted, the United States argues that proof of historic inland water requires the assertion of sovereignty "... must be specific to the particular body of water. Adherence to general rules that might encompass the claim now advanced will not suffice." (Exceptions and Brief, pp. 21-22). The State of Mississippi submits that the limitation urged by the Government is without foundation and should be rejected. The Court's rulings in *Louisiana v. Mississippi*, (1905), and in *United States v. Louisiana*, (1960), provide evidence of specific treatment of Mississippi Sound and Chandeleur Sound in Louisiana as inland waters.

The United States, having relied on *Louisiana v. Mississippi*, *supra*, in support of its treatment of Mississippi Sound as internal waters for several years, now asserts the decision did not constitute a finding that Mississippi Sound was inland waters. In all events, it contends that the United States is not bound by the ruling as it was not a party to that action.[26] (Exceptions and Brief, p. 30). That response, however, misconceives the import of the decision as it relates to a claim of historic waters. The Court has noted that in domestic disputes such as the matter *sub judice*:

> The only way to apply the Convention's recognition of historic bays to this case, then, is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation. (394 U.S. 77).

---

26. Curiously enough, the United States contends that the States are bound by what it perceives to be the construction of Article 7 by the Court in its boundary dispute with Louisiana (394 U.S. 11). It should be noted that the States of Mississippi and Alabama were not parties to that proceeding.

Thus, the issue is whether if the United States were asserting a claim against the international community it could rely upon the Court's judgment in *Louisiana v. Mississippi*, (1905).

The rulings of various tribunals and arbitral decisions are frequently cited by nations in support of historic bay claims. In support of its claim to Long Island Sound as an historic bay, the United States having cited *Mahler v. Transportation Co.*, 35 N.Y. 352 (1866) in its unclassified briefing papers for the United Nations' Law of the Sea Conference (1958), stated: "This decision has not been disputed." (See Joint Exhibit 72, p. 32, and other examples contained therein; the same briefing papers are contained in *4 Whitman, Digest of International Law*, 1965, 233 *et seq.*).

The decisions of the highest Court of a nation provide an important source of international law and, as such, are carefully reviewed by foreign governments as expressive of national policy. In this context, the Court's reference to Mississippi Sound in *Louisiana v. Mississippi* though not perhaps a binding judgment for the United States provides adequate notice to foreign nations of the United States' claim to the Sound as internal waters.

D. Continuous Exercise of Authority.

The Special Master having considered numerous documents regarding the United States' policy of delimiting its inland and territorial waters found the ten mile rule as applied to straits and sounds formed by offshore islands represented the publicly stated policy of the United States from 1903 to 1961 and that under that policy there was no doubt that Mississippi Sound constituted inland waters. Thus, for more than half a century the United

States has claimed Mississippi Sound as inland waters under multiple theories. (See footnote 1).

E. The United States Arguments Notwithstanding, Mississippi Sound Qualifies As an Historic Bay.

The United States maintains that despite its prior public policies regarding delimitation of inland waters, this Court should condone its decision to abandon claims of the United States and the State of Mississippi to Mississippi Sound as inland waters. It terms the effect of its prior policy as an "anachronistic inquiry" signifying nothing. It is said that regardless of its own policy and the attitude of foreign nations it must be permitted to shift national and state boundaries thereby receding from its traditional recognition and treatment of such areas as Mississippi Sound. Its refusal to acknowledge the Sound under the Convention or as an historic bay, therefore, contracts the territory of the State of Mississippi and, at the same time, conveniently transfers ownership of the submerged lands to the United States.

The United States asserts that its disclaimer to the Sound is longer standing than 1971. It argues that by its failure to issue official charts following the effective date of the Convention (1964) it was at least "impliedly recanting any claim to the Sound as inland" (Exceptions and Brief, p. 31). That argument is at odds with Article 7. While provision is made in Article 4(6) for the drawing of straight baselines on official charts, there is no similar requirement for historic bays under Article 7(6). As previously indicated, the United States in arguments before this Court was treating the Sound as a juridical bay as distinguished from the treatment of certain of Louisiana's offshore islands. (See Reply Brief for United States, p. 30 in *United States v. Louisiana*, (1969)).

CONCLUSION

For the foregoing reasons, the State of Mississippi respectfully submits that the Exceptions of the United States to the Report of the Special Master should be overruled, and a decree entered confirming the rights of the State to Mississippi Sound as inland waters.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA, AND FLORIDA,

Defendants.

(ALABAMA BOUNDARY CASE)

REPLY BRIEF OF THE STATE OF ALABAMA

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(ALABAMA BOUNDARY CASE)

REPLY BRIEF OF THE STATE OF ALABAMA

INTRODUCTION

In 1974 the Master recommended that the major disputed areas in Louisiana were neither juridical bays nor historic bays (Rpt. at 18 and 20). In 1984 the Master recommended that Mississippi Sound in Alabama and Mississippi was both a juridical bay and a historic bay (Rpt. at 22 and 55). The Government believes these recommendations conflict. It contends the cases are factually similar and thus both require an identical legal analysis. Under this theory any deviation from the suggested analysis is wrong as a matter of law, regardless of the justification.

The Master compared the cases as well but reached different conclusions. Referring specifically to Caillou Bay, Louisiana, he wrote, "I believe that the factual situation [in Mississippi Sound] differs materially . . . ." (Rpt. at 19).

Referring generally to historic bays in Louisiana he wrote, "Mississippi Sound presents quite a different factual situation . . . ." (Rpt. at 26).

The Master determined that where those factual situations were similar he could apply similar legal authority, but where the facts differed additional legal authority was necessary. In Mississippi Sound, where heretofore untested factual situations existed, the Master was compelled to seek other appropriate legal authorities.

SUMMARY OF ARGUMENTS

I. DAUPHIN ISLAND IS AN EXTENSION OF THE ALABAMA MAINLAND

The Master's recommendation that Dauphin Island is an extension of the Alabama mainland is built on three principles: one, the island forms an integral part of the land because it lies in the mouth of Mobile Bay and adjacent to the inland waters of Mobile Bay; two, the island is connected to Cedar Point, Alabama, by a permanent bridge; and three, the island's geographical situation satisfies the tests established by the Court in *United States v. Louisiana*, 394 U.S. 11 (1969) as to size, distance from the mainland, depth and utility of the intervening waters, shape, relationship to the configuration or curvature of the coast, and origin.

The issue now is, does the record support the Master's recommendations and the legal principles he applied. International law commentators and former United States' officials endorse the first principle. The second is an indication of the geographical configuration surrounding Dauphin Island. The third is a solid application of the facts to the law and should not be rejected unless clearly erroneous.

II. MISSISSIPPI SOUND IS A HISTORIC BAY

The Master's recommendation that Mississippi Sound is a historic bay is built with tools provided by the Court. The Master found the facts supported a conclusion that the United States exercised authority over Mississippi Sound, that this exercise has been continuous since 1803, and that foreign states have acquiesced in that exercise of authority. The United States points out that the Master is the first of his colleagues to reject a Governmental disclaimer in a historic bay situation. The Government believes the Master's analysis is based on either nonexistent law or incorrectly applied law. The United States minimizes the fact that this Master is the first to find that the United States was attempting to prevent recognition of a historic title which may already have ripened. As such, the Master was required to consider facts and law which heretofore had not been considered. Consequently, this case is different from previous ones and produces a different result.

ARGUMENTS

I. DAUPHIN ISLAND IS AN EXTENSION OF THE ALABAMA MAINLAND

A. The Record

In most cases there are both factual and legal questions. This one may not conform to the norm. After four years of litigation apparently the parties agree on the facts. For some reason, the United States apprises the Court, and the defendants as well, that the, "facts underlying the conclusion that Dauphin Island is an extension of the mainland were never in controversy . . . ." Brief for the United States in Support of Exceptions at 7 (hereinafter "U.S. Brief").[1] Assuming for the moment that this is true, is there any

[1] It is unlikely that the Government waives its argument that in order for an island to be considered an extension of the mainland, there must already be an existing headland on the mainland. *See* testimony of Dr. Derek Bowett at T. 1775. *See also* the Government's brief in *U.S. v. Maine*, No. 35, Orig., October Term (1982) at 15-16 (incorporated herein by the U.S.) where the Government argues that only true islands that extend an existing headland or marsh island may be extensions. If this argument is still viable even after the Court announced it in *U.S. v. Louisiana*, 394 U.S. 11, 41-42, 42 n. 83, the parties will certainly disagree on the facts.

reason then to refer to the underlying record or, as the United States turns the phrase, "to stray beyond the half-dozen pertinent pages of the Master's Report." (U.S. Brief at 8). Certainly there is. The Master's Report is a summary of 11 trial days, 2418 transcript pages, and over 800 multi-page exhibits. Far more is contained in that record than the "agreed upon facts". Relevant expert testimony on the proper application of international law to the facts and the documents supporting that testimony are particularly important, but the Government does not want the Court to look at that or any other part of the record.

For example, the Government contends the Master did not choose among experts nor find one opinion more persuasive than another (U.S. Brief at 7). If this were the case, there would not be any reason to explore the record. But this is not the case. The United States' international law expert opined that Dauphin Island was not an extension of the Alabama mainland. His reasons are documented at pages 1793 of the transcript and forward. The United States' international law expert opined that Dauphin Island was an extension of the Alabama mainland. His reasons are documented at pages 2013 of the transcript and forward. The Master recommended that Dauphin Island was an

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(Footnote 1 continued) Assuming the argument is viable, the U.S. position on the facts is that Cedar Point, Alabama, can not be an existing headland from which Dauphin Island may be extended because there is allegedly no bay in Mississippi Sound. *See* Bowett testimony at 1778. Alabama's position is: Cedar Point is a headland for the existing bay in Mobile Bay; Dauphin Island lies in Mobile Bay directly south of Cedar Point; as consequently, Cedar Point may be a headland from which to extend Dauphin Island.

The Court said in *U.S. v. Louisiana*, 394 U.S. at 50 n. 65 that, "The proper location of headlands is, of course, another factual determination which we leave to the initial scrutiny of the Master." Mr. Armstrong did not rule on this question specifically. But he did say, "in my judgment, Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and *Cedar Point*." (Rpt. at 18 n. 7 citing 394 U.S. at 42 n. 53)(emphasis added). If the U.S. still maintains its argument and there is a current factual dispute, the Master resolved the dispute in favor of the states.

extension of the mainland. This recommendation was not solely "the product of independent reasoning from agreed facts," as the United States contends. (U.S. Brief at 7). It included a clear choice of experts and a recommendation based on precisely the testimony given by the States' expert. *See* Dr. Michael Reisman's testimony at 2042, 2049-2050, 2085 and 2101.

In addition, the Master's recommendation is supported by other recorded commentary. The Master assumed as true the proposition that inland waters are assimilated to the mainland. Contrary to the Government's position that this proposition has never been endorsed by any commentator (*see* U.S. Brief at 14) it was endorsed by a deputy legal advisor for the United States Department of State before a United States' Senate Committee hearing on the Submerged Lands Act. *See* Joint Exhibit 75, part (1) at 1051-1052; T. 693.

The Master also assumed as true the proposition that under Article 7(3) of the Geneva Convention where islands lie in the mouth of a bay, the lines across the mouths are baselines for all purposes. This interpretation of Article 7(3) was endorsed as *obvious* by the United States in an earlier brief in this litigation. *See* Joint Exhibit 66 at 31 n. 12; T. 692.

There is this and *more* in the record. Whether it is in the form of testimony, exhibits or written arguments, the record of this case and the ones previous should not be ignored. To ignore them is to ignore the basis of the Master's recommendations and more importantly the Master's familiarity with the record.

In a previous stage of this litigation Mr. Armstrong was described as an, "able master [with] a more intimate familiarity with this 'long-continuing and sometimes strained controversy' than an appellate judge possibly can acquire by studying only the available record." *United States v. Louisiana*, 446 U.S. 253, 273 (1979) (opinion of Powell, J., joined by Stewart and Rehnquist, JJ.) (parenthetical added). In this stage of litigation Mr. Armstrong

became intimately involved in these proceedings by frequently questioning witnesses on important points of fact and law. The record, the Master's recommendations, and his familiarity with the record go hand in hand. It is neither necessary for the Court to ignore the record nor necessary for the Court to ignore the Master's report. Simply stated, the two agree.

B. Bases Of The Master's Recommendations

Mr. Armstrong found that Dauphin Island constitutes an extension of the Alabama mainland (Rpt. at 18). In support of this finding he discussed three related principles. These are: one, Dauphin Island forms an integral part of the mainland because it lies in and adjacent to the inland waters of Mobile Bay, which waters are considered part of the mainland (Rpt. at 14, 15-16); two, Dauphin Island is connected to Cedar Point, Alabama, by a permanent bridge (Rpt. at 13-14, n. 5); and three, the geographical situation satisfies the test outlined by the Court in *United States v. Louisiana*, 394 U.S. at 66 (Rpt. at 16-17).

The Master relied on the first of these principles because he believed that: one, "under the Geneva Convention internal waters are to be subsumed under the general category of mainland" (Rpt. at 14); two, "inland waters are to be considered part of the mainland" (Rpt. at 15); and three, "where islands lie in the mouth of a bay they are to be considered as part of the mainland for *all* purposes (Rpt. at 16) (emphasis in original). Assuming this to be correct Mr. Armstrong concluded that because Dauphin Island was in the mouth of Mobile Bay and because the United States closed the admittedly inland waters of Mobile Bay with bay closing lines to Dauphin Island, then Dauphin Island was a part of the mainland. The United States contends this proposition "has never been endorsed by the Court or by any commentator . . ." (U.S. Brief at 14). Apparently the Master believed otherwise and as the record and supporting literature stand, he is correct.

1. Inland Waters Are Part of the Mainland — The Master's First Criterion

a. The Factual Relationship of Dauphin Island to the Mainland

Testimony of Dr. Louis DeVorsey

Before either international law expert testified Mr. Armstrong demonstrated his interest in the relationship of Dauphin Island to the mainland, particularly as that relationship applied to historic boundaries. He questioned Dr. Louis DeVorsey, the United States' historical expert on this relationship.

Dr. DeVorsey testified that the term "westwardly" in Mississippi's boundary description described a line on the ground that followed the mainland shore. (T. 1577 and 1578). Mr. Armstrong asked him if he drew a line along the mainland would he not then have a problem with gaps in the line (T. 1578). Dr. DeVorsey responded that this was a problem that gave him considerable concern. (T. 1578) Mr. Armstrong continued, "But on your own interpretation of westwardly, along the mainland you would follow the contour of these bays up to their termination and back down again to the — (interupted) (T. 1578). Dr. DeVorsey admitted there was a conflict. (T. 1578-1579).

Mr. Armstrong ended his questions for that day but the identical point was raised the next. This time the specific relationship between Dauphin Island and Mississippi Sound was discussed.

On cross-examination Dr. DeVorsey was asked to draw his interpretation of Alabama's boundary (T. 1734). After a night's rest Dr. DeVorsey decided that the boundary line would not run along the mainland but would close Mobile Bay between Cedar Point and Mobile Point (T. 1737). Mr. Armstrong responded, "I recall my inquiry was generally in regard to bays and indentations, not specifically Mobile Bay (T. 1738). Dr. DeVorsey answered by explaining that his initial problem was with large indentations such as "Pascagoula, Mobile, Perdido, whatever . . . ." (T. 1738).

Later cross-examination to determine the extent of Dr. DeVorsey's change of opinion precipitated a final but specific line of questions from the Master. Mr. Armstrong was concerned with a document which referred to Dauphin Island as "being in Mobile Bay" (T. 1740). He asked if that was the witness's opinion. The answer was no. More questions ensued. This testimony records Mr. Armstrong's acute concern with the relationship of Dauphin Island to Mobile Bay and is reproduced as Attachment 1.

Testimony of Dr. Michael Reisman

The Master was not only concerned with Dauphin Island's relationship to Mobile Bay but also was concerned with Mississippi Sound's relationship to Mobile Bay. Where did one begin and the other end? If Dauphin Island was an extension of the mainland for Mobile Bay could it also be an extension for Mississippi Sound? He found the answers to these questions from direct testimony and in response to his own examination of the witnesses.

In response to the question, "On the east end, then, it [Mississippi Sound] is enclosed by internal waters which are treated the same as land territory itself?" (T. 2021), Dr. Reisman answered, "yes." A follow-up question was asked. "In other words, it would be treated in very much the same way as the mouth of a river?" (T. 2022). The answer, "yes" (T. 2022). At this point the Master interjected a series of questions:[4]

[4] Begging the Court's indulgence, this quotation and others are extensive. Because the U.S. discounts the record, Alabama believes emphasized quotations are necessary, particularly in light of the record's mass. Where possible this procedure will be minimized.

THE COURT: Let me follow-up on that thought a moment. That would be treating Mobile Bay and Mississippi Sound as separate areas of water?

A. Yes, sir.

THE COURT: And under your interpretation each of them would be a separate juridical bay?

A. Yes, sir.

THE COURT: It is possible for a bay to open into another bay, is it not?

A. Certainly. Lake Borgne, for example, opens into Mississippi Sound.

THE COURT: And would it also be possible then to draw a closing line across the mouth of the combined Mobile Bay and Mississippi Sound from Mobile Point to Dauphin Island rather than treating them as two separate bodies of water and drawing your closing line on this line across from the mainland? Do you follow me?

A. I follow you. This is without regard to the 24-mile rule which would be affected by this.

THE COURT: Well, that's the reason I'm asking the question, yes. You would then have one super large bay, wouldn't you? Whether it would meet the 24-mile rule or not, I do not know.

A. Under juridical bay theory, you wouldn't get to that point because you have already exceeded the 24-mile limit. If you were arguing in terms of historic bay, which is not covered by Article 7, actually not covered by the convention, then it would be possible to establish a super bay. There are such bays within the United States that exceed the 24-mile limit, but not on the basis of being a juridical bay.

If we're talking about juridical bays, we would have two bays here (indicating) coming from different headlands or two different natural entrance points,

one bay being bounded on the — Mobile Bay being bounded on the west by Cedar Point or Dauphin Island, Mississippi Sound being bounded on the eastern extremity, eastern terminus, by Dauphin Island.

THE COURT: Well, in your judgment are they two separate bodies of water, two separate juridical bays, or each part of one large body of water?

A. The juridical bay analysis wouldn't address the second question since bays generally are in apart contiguous with the high seas and are contiguous with something else. The juridical bay questions would be whether or not the waters are landlocked, intimately connected with the coastal area, and then if so, whether or not the requirements of a juridical bay spelled out in Article 7 are so. Even though the waters are continuous, my view would be they are two juridical bays.

Transcript at 2022-2024.

In regard to the question of whether Dauphin Island could be an extension of the mainland for both Mobile Bay and Mississippi Sound the Master was told:

> I'm struck by the fact that Dr. Bowett said yesterday that Dauphin Island could — if I recall it correctly, that Dauphin Island could not be an extension of the mainland because the area behind it was not a headland. Now, it seems to me that Cedar Point is a headland because we know that Mobile Bay is a juridical bay. And if it's a headland for Mobile Bay, I can't see how it loses the headland status for Mississippi Sound. So it seems to me there would be another reason there for Dauphin Island to be considered constructively part of the mainland for bay purposes.
>
> Under all of those theories, I think a very plausible case can be made for the assimilation of Dauphin Island to the mainland for bay determination.

Testimony of Dr. Reisman, transcript at page 2041. *See* footnote 1 above.

Assuming for the time that Dauphin Island was not an extension of the mainland the Master concluded "in my judgment Mobile Bay and Mississippi Sound are separate bodies of water joined by a strait located between Dauphin Island and Cedar Point." (Rpt. at 18).

b. The Legal Relationship of Dauphin Island to the Mainland.

The Master found that, "there seems to be no doubt that under the Geneva Convention internal waters are to be subsumed under the general category of mainland." (Rpt. at 14). He assumed true that, "inland waters are to be considered part of the mainland . . . ." (Rpt. at 15).

Dr. Reisman testified about these two points on direct examination and on cross-examination. On direct examination he stated that internal waters are treated the same as land territory much like the treatment of a mouth of a river (T. 2021-2022). He added shortly, "Internal waters are assimilated to the land of the State . . . ." (T. 2042).

In response to questions from the Master, Dr. Reisman reaffirmed his interpretation of the law. After counsel from Mississippi asked the witness what closing lines should be drawn for Mississippi Sound (T. 2048-2049), Dr. Reisman answered, "If you don't consider it [Dauphin Island] part of the mainland, that part [the eastern terminus of Mississippi Sound] is closed by the presence of internal waters to the eastward (T. 2049-2050) (parentheticals added). At which point Mr. Armstrong wanted a clarification of the issue. He questioned the witness:

> THE COURT: I'm a little confused by your last statement. There would still have to be a closing line of some type at the extreme eastern terminus of the Mississippi Sound, would there not?
>
> A. If Dauphin Island is deemed to be part of the mainland?
>
> THE COURT: Yes.
>
> A. Then it is not necessary.

THE COURT: And if it is not deemed part of the mainland?

A. If it is not deemed to be part of the mainland, then, as I said, I think it's not the most plausible of contruction, but if it is not, you will notice that the waters to the eastward are internal waters.

THE COURT: Would be equivalent to mainland?

A. Correct.

THE COURT: So the eastern terminus would actually be at the eastern extremity of Dauphin Island —

A. Correct.

THE COURT: — under your interpretation.

A. Yes, Sir.

On cross-examination Dr. Reisman again affirmed his interpretation. He testified, "Dauphin Island . . . . is up against internal waters of Mobile Bay which would also close off part of Mississippi Sound and so we start here with quite a marked concavity." (T. 2084-2085). He later added, "the only data that is necessary is that the waters lying westward in that area [the dividing line between Mississippi Sound and Mobile Bay] are internal waters. If they are internal waters, they are assimilated to the land mass and as a result close off that section." (T. 2101) (parenthetical added).

c. The Master's First Criterion is Legally Correct

(1.) Inland Waters Are Subsumed Under the Category of Mainland and Are Considered Part of the Mainland.

In support of his determination the Master relied on Figures 5 and 6 in Alabama's Post Trial Brief. Facsimile reproductions of those figures appear as Attachments 2 and 3 along with a nautical chart of Mobile Bay, Attachment 4. Attachment 4 depicts the closing lines for Mobile Bay from Cedar Point to Dauphin Island and from Dauphin Island to Mobile Point. Attachment 2 demonstrates

the agreed upon inland waters of Alabama as determined by United States' closing lines. Attachment 3 applies the Master's proposition that inland waters are to be assimilated to the mainland. The result depicted is a marked concavity within the Alabama mainland creating the eastern terminus of Mississippi Sound. The logic is simple and makes common sense. The only issue to determine is whether the result is legally correct.

The proposition applied by the Master, was endorsed *directly* by Dr. Reisman. It was endorsed *generally* as an accepted principle of law by Jack B. Tate, Deputy Legal Advisor for the United States' Department of State, by William H. Davis, Special Master in *United States v. California*, Report filed November, 1952; by Robert D. Hodgson, former Geographer for the United States' Department of State; and by Myers S. McDougal, Professor of Law and international law commentator, Yale University.

Jack B. Tate, Deputy Legal Advisor, United States' Department of State

Mr. Jack Tate, Deputy Legal Advisor for the United States' Department of State in 1953, succinctly summarized the United States' position on the assimilation of inland waters. At the same time he explained how this proposition coordinated with the United States' position on determining baselines. Mr. Tate testified at hearings before the Senate Committee on Interior and Insular Affairs on March 3, 1953. The Committee was studying what would become the Submerged Lands Act. This testimony, in retrospect, capsulizes the Master's Report. It is a drawstring on this entire matter and applies to historic bays as well as mainland extension. This testimony contains many of the Master's basic premises which are noted where appropriate. Mr. Tate testified:

> I should like to summarize briefly first the *historic position of the United States* with respect to the question of control which a coastal State may exercise in

the waters adjacent to its coasts. I shall review briefly the policy reasons which lead this Government to follow and maintain this position. And then I shall finally examine points which appear to involve a possible conflict with our traditional position in the field of foreign relations.

The position of the United States with respect to the control which a coastal state may exercise involves three areas: Inland waters, territorial waters, and high seas.

The relevance of considerations concerning inland waters is this. The belt of territorial waters is measured from the coast. On the land portion of the coast, the line from which territorial waters are measured is the low-water mark of the tide. Since bodies of water such as bays, gulfs, rivers, and so forth, also open on the coast, it is necessary in such cases to use a fictional line from which to measure territorial waters. *The position of the United States is that the waters of bays and estuaries less than 10 miles wide — or which are, at the first point above such openings, less than 10 miles — are inland waters of the United States, and the territorial limit is measured from a straight line drawn across these openings.* [*See* Master's Report at 52]. A strait or channel, or sound which leads to an inland body of water, is dealt with on the same basis as bays. But the waters of a strait which connect two seas having the character of high seas are not inland waters. *It is an essential feature of inland waters that they are assimilated for all intents and purposes to the land territory of the coastal State,* [*See* Master's Report at 15] and foreign vessels may not claim in such waters a right of innocent passage. Foreign vessels may, however, claim a right of innocent passage through straits connecting high seas. *A more detailed review of the traditional position of the United States regarding the determination of the base line of territorial waters was*

furnished by the Department to the Attorney General in a letter dated November 14, 1951, [*See* Master's Report at 48] and a copy of this letter, *as well as of a supplementary letter dated February 12, 1952,* [*See* Master's Report at 51] has been furnished I believe to the committee.

Proceedings of the Submerged Lands Act: Hearings on S. 249 before the Committee on Interior and Insular Affairs of the U.S. Senate, 83rd Cong., 1st Sess. at 1052 (statement of Jack B. Tate) (emphasis supplied) (parenthetical added) (Jt. Ex. 75, part 1; T. 693).[5]

William H. Davis, Special Master.
United States v. California

In 1947 the Court determined that the States did not have rights in the territorial sea. *United States v. California,* 322 U.S. 19, 38-39 (1947). Thereafter the Court appointed William Davis as Special Master to hear the factual questions. The Master filed his first report on May 31, 1949. On December 3, 1951, the Court requested the Master to recommend an answer to this question, "What is the status (inland water or open sea) of particular channels and other waters areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined." United States Department of State, Digest of International Law, V.4, 257-258 (1965). *See* the syllabus of opinion in *United States v. California,* 381 U.S. 139 (1965) for a history of those proceedings.

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[5]Apparently the U.S. has softened its position on inland water assimilation. In its Comments on the Master's Draft Report counsel wrote, "Inland waters are not assimilated to mainland . . . ." Comments at 2. In its brief to the Court counsel wrote that the Convention does not confuse inland water and mainland (U.S. Brief at 15).

Mr. Davis recommended, quoting Mr. Jack Tate, that the criteria to determine inland water limits is that "It is an essential feature of inland waters that they are assimilated for all intents and purposes to the land territory of the coastal state . . . ." Digest of International Law at 258.

Robert D. Hodgson, Former Geographer for the United States Department of State

Dr. Robert D. Hodgson testified on behalf of the Federal Government in the Louisiana Boundary Case. His testimony, quoted by Louisiana, is both support for the Master's proposition and commentary by a respected scholar. His testimony, in reference to the Terrebonne Bay Complex in Louisiana, included these two passages:

> Q. Do you recognize, sir, that the waters – I see here on a map of New Orleans – the Mississippi River at New Orleans is part of the mainland.
>
> A. Yes, sir.
>
> Q. So it is not necessary, then, for something to be physically land to be part of the mainland; it may indeed be a water [body] which is juridically inland waters may it not?
>
> A. Yes, sir.

Brief for the State of Louisiana in Proceedings before the Special Master, Filed January 3, 1973, at 16 (cited by Louisiana as testimony at tr. 5495) (parenthetical in Louisiana citation); and,

> When any island, Dr. Hodgson, which I understand from your testimony are islands within or at or near – I forget exactly the term you used – the mouth of a bay, I believe you recognized that there occur natural entrance points on the islands and that you close across the island; is this correct, sir?
>
> A. That is correct, sir.

> Q. And you don't just leave a gap of water there and say, well, that has no juridical status as inland water between those islands or some part thereof?
>
> A. Where you are drawing a bay closing line.
>
> Q. Now, at Timbalier and Terrebonne Bay, there was a bay closing line drawn, was there not, sir.
>
> A. Yes, sir.
>
> Q. And it was proper, therefore, to close those islands ultimately to the mainland?
>
> A. Yes, sir.

Id. (cited by Louisiana as testimony at 5495).

Dr. Hodgson's testimony is significant for two reasons. One, it supports the Master's general proposition that inland water is assimilated to the mainland. Two, it supports the Master's recommendation that where islands lie in the mouth of a bay with bay closing lines across the mouth it is proper to close the islands to the mainland.[6]

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[6]Attachment 5 is the pertinent portion of the chart 1274, 9th Ed., July 7, 1969, the Lake Pelto-Terrebonne Bay-Timbalier Bay Complex discussed by Dr. Hodgson. Attachment 6 is figure 42 in Appendix I to the Exceptions of Louisiana to the Report of the Special Master at 302, filed May 13, 1974. Attachment 5 shows the bay closing lines referred to by Dr. Hodgson and Attachment 6 demonstrates the application of his principles, the same employed by Mr. Armstrong for Mobile Bay. See Attachments 2 and 3 and the Master's Report at 14. There is no conflict between the Louisiana and Alabama arguments through this comparison. Although the Master found that certain areas in Louisiana did not qualify as juridical bays, the Terrebonne Bay complex was not one of them.

Myers S. McDougal, Professor of International Law, Yale University

Mr. Myers McDougal is a respected international law scholar and commentator cited frequently. In his work, The Public Order of the Oceans, McDougal and Burke (1962), he explained the fundamental importance of internal waters. He wrote, "The significant point is that internal waters are immediately adjacent to the land territory of a state, thus facilitating an especially intense concentration of both inclusive and exclusive interests." *Id.* at 89. This is consistent with his earlier writings that "a state has all competence over its internal waters that it has over land areas within its boundary has long been accepted." *Id.* at 64. *See* McDougal and Burke at n. 93.

The significance of Mr. McDougal's analysis is that one state's acceptance of the competence another state has over its inland waters is not limited to a jurisdictional question. It is an accepted principle of international law that inland water is actually treated as land. Mr. McDougal stated the principle simply and directly. He wrote, "Internal waters are assimilated to the territory of a state and are demarked from territorial waters by an artifact called baselines." McDougal and Reisman, International Law in Contemporary Perspective (1981) at 511. This position agrees with that of Mr. Tate, Mr. Davis, Dr. Hodgson, Dr. Reisman and of course Mr. Armstrong. There is strong precedent in international law which support them.

Justice Stewart summarized it in *United States v. Louisiana*. He wrote:

> Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the *complete* sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether.

394 U.S. at 22 (emphasis added) (footnote omitted).

That characterization is consistent with codified international law. Writings from the United States Department of State explain. In its Digest of International Law the Department states:

> Article 26, paragraph 2, of the 1956 draft of the International Law Commission on the Law of the Sea, part II, "High Seas", reads:
>
> "2. Waters within the baseline of the territorial sea are considered 'internal water'."
>
> The International Law Commission's Commentary with respect to Article 26 stated:
>
> (1) . . . Waters within these baselines (baselines from which the territorial sea should be measured) are internal waters, over which, subject to the provisions of international law limiting the rights of the State —particularly as regards ports and international waterways — *the State exercises its sovereignty in the same way as over the land.*

Id., at V. 4. 197 (1965) (emphasis added).

The above two explanations agree with Mr. Aaron Shalowitz, who writes in his book, Shore and Sea Boundaries (1962) at 23, "The common legal feature of all inland waters is the *complete* sovereignty which a nation exercises over them, the same as it exercises over its land territory." (emphasis added). The American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, adopts the same approach. In its *Tentative Draft No. 8*, § 511 at 79 (1982) the Institute writes, "Internal waters are waters wholly or largely surrounded by a State's land territory. Under International Law, a coastal State's sovereignty over its land territory *extends* to its internal waters, including bays." *Id.* (emphasis added).

All of the above form a basis for Mr. Armstrong's application of the rule that inland waters are assimilated to the territory of the state which surround them. The com-

mentators above assure us that the proposition is correct as a matter of law.

(2.) Closing Lines to Islands in the Mouth of a Bay are Baselines for All Purposes.

The Master relied on the Court for the proposition that "where islands lie within the mouth of a bay they are to be considered as part of the mainland for *all* purposes" (Rpt. at 16). This he believed could be derived from Article 7(3) of the Convention. It is closely aligned with the Master's inland water assimilation principle.

The United States argues that the Master is *plainly* mistaken and suggests that Article 7(3) only applies to the semi-circle test and the 24-mile rule of Article 7, Sections 2 and 4. Apparently governed by another of its multiple personalities, the United States argues, as it has so often, against one of its prior legal positions.[5] In this instance it is one which the Government described as obvious. The United States wrote in 1968:

[5] In the 1966 Term the United States interpreted *Louisiana v. Mississippi*, 382 U.S. 1 (1965) for the proposition that Mississippi Sound was inland waters. *See* brief of the United States in Support of Motion for Judgment, *United States v. Louisiana*, No. 11, Orig., October Term (1966) at 17 and 128. In the 1967 Term it reached the same conclusion. *See* brief of the United States in Support Motion for Judgment on Amended Complaint, *United States v. Louisiana*, No. 11, Orig., October Term (1967) at 254. Today the United States opposes this interpretation. *See* U.S. Brief at 29.

Also in the 1967 Term the U.S. went so far as to say the water between the islands and the Alabama mainland is inland. *See* brief on Amended Complaint at 26. This is of course the general issue the U.S. now opposes.

Also in 1968, seven years after ratification of the Geneva Convention, the U.S. described Mississippi Sound as an indentation with islands in its mouth. *See* Reply Brief of the United States in *United States v. Louisiana*, No. 9, Orig., October Term, 1968 at 30. The U.S. now argues against that interpretation. *See* U.S. Brief at 8 incorporating by reference its brief in No. 35, Original.

> Article 7 specifies that "Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths." 15 U.S.T. (Pt. 2) 1609. This *obviously contemplates* that those lines will be considered *the closing lines of the bay for all purposes*, including delimitation of its area and application of the 24-mile limitation on its entrance width.

Reply Brief for the United States, *United States v. Louisiana*, No. 9, Orig., October Term (1968) at 31 n. 12 (cf. committed) (emphasis added).

This interpretation not only agrees with the Master but also agrees with the Court. After quoting Article 7 (3) of the Geneva Convention, Justice Stewart wrote, "While the only stated revelance to such islands [islands in the mouth of a bay] is to the semi-circle test, it is clear that the lines across the various mouths are to be the baselines for all purposes." 394 U.S. at 55 (footnote omitted) (parenthetical added).

If the Court had meant that this baseline was proper only for Article 7 purposes, surely it would have specified what purposes would not be embraced by the baseline. But it did not. The answer may lie in the fact that baselines are closing lines. They separate inland and territorial waters. They form the line from which territorial waters are measured. They are the lines for measuring the semi-circle test and the 24-mile rule under Article 7 sections 4 and 2 and finally they are the coastlines, "the lines of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," 43 U.S.C. 1301 (c), under the Submerged Lands Act.

If these lines are baselines for all purposes as they appear, then Dauphin Island is in fact included in the baseline for Mississippi Sound and Mobile Bay for all purposes. This situation was created by the Government when it enclosed Mobile Bay with baselines to Dauphin Island —a fact which simply has not existed in any other case.

d. The Master's First Criterion is Factually Correct

The United States contends the Master's Report is inconsistent with his *Louisiana Boundary Case* Report and accordingly compares Dauphin Island to numerous locations in Louisiana. For the most part the comparison is discussed in the Government's brief in *United States v. Maine*, No. 35, Original, October Term, 1983. Two areas however are specifically mentioned in the Government's No. 9 brief. These are Caillou Bay and the Garden Island Bay — Red Fish Bay Complex. The former, the Government maintains is the closer parallel.

1. Caillou Bay

The United States writes in regard to Caillou Bay and the Isles Dernieres, "There, as here [with Dauphin Island], at least one of the islands was not merely over inland water, but was actually 'connected' to the mainland by inland waters and that fact was invoked by Louisiana in exactly the same way as Alabama had done in the instant proceedings." (U.S. Brief at 13) (emphasis in original) (parenthetical added). That statement is absolutely wrong. The factual situations in Alabama and Louisiana are in no respect the same; and consequently, the legal arguments are quite different.

A factual analysis demonstrates that in Louisiana the islands in question were the western three (two large and one small) of the Isles Dernieres chain. These islands were the obvious ones needed and claimed by Louisiana to create an indentation for Caillou Bay. For an identification of those islands see Exceptions of the State of Louisiana to the Report of the Special Master filed July 31, 1974, and Brief in Support of Exceptions at 146. There, Louisiana described the area as "*the last several islands of the Isles Dernieres chain* . . . ." Brief in support of Exceptions at 148 (emphasis added). *See also*, Report of the Special Master in *United States v. Maine*, No. 35, Orig., October Term, 1985, received January 13, 1984, where Mr. Hoffman wrote, "Caillou Bay is formed on one side by the Louisiana coast

and on the other side by a group of two islands of the Isles Dernieres." *Id.* at 32 (emphasis supplied).*

The islands the United States referred to are not the same islands. Attachment 7 is a portion of chart 1275, 9th ed. July 26, 1969, depicting Caillou Bay and the western Isles Dernieres. These are the islands referred to by Louisiana and Mr. Hoffman. They are not connected in any fashion to inland water. Attachment 8 is a portion of chart 1274, 9th ed., July, 1969, depicting the eastern Isles Dernieres and Lake Felix. These are the islands described by the United States and include the islands which are connected to inland water (Lake Felix). There are no physical

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*Louisiana described the islands as three because of a low tide elevation located approximately where the final "s" of Isles Dernieres stops on Chart 1275. *See* Attachment 7.

The basis of the United States' determination that Lake Felix is inland water is not clear. The Court described the area thusly, "with respect to some spots along the Louisiana coast . . . the United States has . . . recognized that these insular configurations are really 'part of the mainland.' The western shore of the Lake Felix . . . indentation is such a formation, and is treated by the United States as part of the coast." *United States v. Louisiana*, 394 U.S. at 68.

While admitting that some of the Lake Felix islands were extensions of the mainland, the U.S. limited its agreement to only those islands north of Caillou Bora. *See* U.S. Brief in No. 35, Original at 14 n. 7 regarding "Whiskey Island." Attachment 5 contains closing lines for the Lake Felix Bay complex illustrating the U.S. Position as of July, 1969. Assuming the position the U.S. applies to Mississippi Sound, that is, if all of the islands not extensions of the mainland are eliminated from the chart, then there is no indention in Lake Felix. Assume another U.S. position applied to Mississippi Sound, that is, islands cannot create a bay, and then there is no bay at all. The best that can be formed in order to meet the 24 mile limit is a bay closed on the eastern headland of Timbalier Bay with the western headland of Terrebonne Bay (near Bay Saint Elaine). This line would be approximately 21 nautical miles. *See* attachment 6 where the major islands are eliminated to demonstrate this situation.

connections between the eastern and western Isles Dernieres and no bay closing lines."

Consequently, it was impossible for Louisiana to contend as does Alabama that an island extension which forms a bay indentation is the same island that lies in undisputedly inland waters. The only way this argument could assist Louisiana is if the islands next in sequence were assimilated along with the islands lying on inland water. This is commonly referred to as leapfrogging and is the exact reason why Caillou Bay was not held to be a juridical bay. Concerning the Isles Dernieres and Lake Pelto, neither the Master nor the Court addressed the questions of inland water assimilation although Dr. Hodgson clearly applied such a principle to Lake Pelto and it appears that the Master may have accepted an inland assimilation theory for the Lake Pelto Bay complex. *See* footnote 7 below.

The factual situation in Alabama is different. Attachment 10 is a portion of chart 1266, 20th ed., April, 1971. It depicts the western half of Dauphin Island and the south-

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(Footnote 7 continued) for this is apparently not the result of the Louisiana Boundary Case there must be some reason why Lake Pelto, Terrebonne Bay and Timbalier Bay are inland waters. The U.S. cites the Master's Report at 48-49 from the Louisiana case for support of their claim that no islands, save a few, were determined to be extensions of the Louisiana mainland. *See* U.S. brief in No. 35, Original at 14, n. 7, regarding "Whiskey Island" and East Timbalier Island. In his report the Master located two and only two closing lines for Timbalier Bay finding that the complex like Ascension Bay was an over large bay. One closing line extends from Timbalier Bay to an unnamed island on the east and the other extends west to the easternmost Isles Dernieres. *See* Attachment 5. The Master does not discuss Lake Pelto or Terrebonne Bay. Unless the other islands are extensions of the mainland the Master would have had to close the other bay mouths. If this is true it is a clear example of the approach the Master applied to Mississippi Sound and a practical application of the principles endorsed by Jack Tate and Robert Hodgson. The result is as depicted on Attachments 6 (for Louisiana) and on Attachments 2 and 3 (for Alabama).

"Attachment 9 is the current chart of the Lake Pelto Bay Complex. A shoal area connecting the east and west Isles Dernieres appears on this black and white reproduction. This is misleading. On the original color chart this area is either a shoal or a low tide elevation.

ern two-thirds of Mobile Bay. As shown, Dauphin Island lies on inland water and it is the only island Alabama contends creates the eastern indentation for Mississippi Sound. It is not necessary for the state to leapfrog from inland water to any island or from one island to another. If the inland water is considered mainland as the Master and others profess, Dauphin Island lies adjacent to the mainland and there are no intervening waters between the island and the mainland.

(2.) Garden Island Bay — Red Fish Bay

The United States also compares the Louisiana Garden Island Bay — Red Fish Bay complex to Mississippi Sound. The comparison is only by way of a quotation from Mr. Armstrong. The United States does not compare the physical characteristics of these bays. Should the Court decide to compare them, it will find two incomparable areas. As a point of reference Attachment 11 is a portion of Chart No. 11363 depicting Garden Island Bay and Red Fish Bay.

The issue associated with this Bay Complex was whether mud lumps lying off the entrance points to the bays were extensions of the mainland. Louisiana argued that because the first mud lump was considered an extension of the United States then the next island in the chain should be considered an extension of the first. Similar to its Caillou Bay situation Louisiana wanted to leap from one island to the next and as it leaped the state wanted to create successive bodies of inland water and extend its coastline, a direct contrast to Alabama where the coastline would not be extended beyond its present position if Dauphin Island is an extension of the mainland. The seemingly never ending mud lumps off Red Fish Bay are depicted on Attachment 11.

In this context Mr. Armstrong rejected Louisiana's argument that inland water was the equivalent of land. He prefaced his remarks by explaining the unending leapfrog relationship that could exist and apparently analyzed the bay complex mud lumps in much the same way the Court analyzed lowtide elevations.

The Court discussed low tide elevations in *United States v. Louisiana* and found that those within territorial seas were only a part of the coastline from which a state's three-mile grant is measured and could not extend the state's territory. *Id.* at 394 U.S. 47. This conclusion was based on Article 11 of the Geneva Convention. Justice Stewart wrote, quoting the International Law Commission, "drying rocks and drying shoals could only be used once as points of departure for extending the territorial sea and that the process could not be repeated by leapfrogging, as it were, from one shoal to another." *Id.* at 46. In reaching this conclusion Justice Stewart acknowledged Louisiana's contention that the term "mainland" generally includes inland water and that bays and other waters are assimilated to the dry land. *Id.* at 42. Justice Stewart *did not discuss or rule on* the "mainland" argument, but referred the reader, by way of footnote 50, to 394 U.S. 22. Not surprising, the reference was to the Court's discussion of the three zones of the navigable sea and its acceptance that inland waters are "subject to the *complete* sovereignty of the nation as much as if they were a part of its land territory . . ." *id.*, at least an indication that Justice Stewart did not disagree with the "mainland" argument.

In summary, while the Court may have rejected Louisiana's factual situation it did not reject the basis of the state's legal argument.

(3.) The Louisiana Boundary Case From *United States v. Maine*, No. 35, Original

The United States final comparison of the present case to that of Louisiana is from its brief in *United States v. Maine*, No. 35, Orig., October Term, (1983), incorporated herein by the United States. The Government relies on that brief for the proposition that Dauphin Island is not an extension of the mainland when compared to decisions affecting other geographical areas. Like many other examples cited these too are factually different from Dauphin Island.

The United States writes, comparing Dauphin Island to certain Louisiana islands, "The Court likewise treated as *true islands* island fringes [similar to the Isles Dernieres] shielding the entrances of Barataria Bay, Bob Taylor's Pond, Zinzin Bay and Riverside Bay. *See* 394 U.S. at 50 n. 65, 52-53 n. 71, 58-59 n. 79, 66-67 67 n. 88." U.S. brief in No. 35, Orig., at 13 (emphasis added). In a footnote to the above quote the United States weakens its assertion and through extrapolation infers that the Court accepted the islands mentioned as true islands. *Id.* at n. 6. The Court did *not*. It said in reviewing the Government's 1969 position on the proper headlands for Barataria Bay, Bob Taylor's Pond, Zinzin Bay and Riverside Bay, "the proper location of headlands is, of course, another factual determination which we leave to the initial scrutiny of the Master." *United States v. Louisiana*, 394 U.S. at 77 n. 65.

The United States continues its discussion of the *Louisiana Boundary Case* by listing nine specific areas where mainland extension were rejected. These fall into three categories; one, mud lumps and lowtide elevations; two, islands adjacent to inland waters; and three, island keys. The first category, mud lumps and lowtide elevations is not factually comparable to Dauphin Island. The examples cited are identical to those discussed above in reference to Garden Island Bay and Red Fish Bay. Dauphin Island is a true island and is adjacent to inland water. The United States' examples are lowtide elevations and mud lumps and not adjacent to inland water.

The second category, "islands adjacent to inland water" contains two examples, East Timbalier Island and "Whiskey Island".[9] These islands are discussed in note 7 above. Again the United States cites the *Louisiana Boundary Case* Master's Report pages 48-49 as support for the

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[9]Alabama was unable to find an island named Whiskey Island. Whiskey Pass separates the Isles Dernieres on the southern shore of Lake Pelto therefore it is assumed that Whiskey Island is that island lying above Whiskey Pass. *See* Attachment 8.

rejection of these islands as extensions of the mainland. But as stated the Master found natural entrances between the most eastern Isles Dernieres and Timbalier Island and between East Timbalier Island and an unnamed island to its west and no others for Timbalier Bay. *See* attachment 8.

This bay configuration is a mirrow image of Mississippi Sound. The Master treated the two similarly. The United States should also, whether through Dr. Hodgson's assimilation principle (*see* Attachment 6) or because the islands screen the bay. As the Government writes, "The Equal Footing Doctrine forbids treating some states more generously than others." U.S. Brief in No. 35, Orig., at 16.[11]

The third comparison, island keys (the Shell Keys) is equally inappropriate. The map attached to the Louisiana Boundary Case (1969) depicts these keys well out into the Gulf. Obviously they cannot be extensions of the mainland; they lie off of Marsh Island.

2. Dauphin Island Bridge — The Master's Second Criteria

In 1866 the Alabama Legislature authorized a study for the construction of a bridge to Dauphin Island (Al. Ex. 7-2; T. 1094, 1220). In the early 1900's the Mobile and Ohio Railroad wanted to extend a line to Dauphin Island but found that the marsh would not support a train's weight (Ala. Ex. 7-2; T. 1094, 1220) (assuming early 20th century technology). In 1948 the Mobile, Alabama, Chamber of

[11]In its brief in No. 35, Orig., at 15, the Government discusses some areas it believes to be extensions of the mainland, but the government neither mentions all of those areas by name nor includes every example. In addition to the Lake Pelto Islands above Caillou Bora, 394 U.S. at 430 and the first mud lump off Red Fish Bay (Master's Report at 40, *Louisiana Boundary* case) there are the islands forming Albemarle and Pamlico Sound (Jt. Ex. 3; T. 669); Matagorda Island, Texas (Baseline Committee Minutes of August 17, 1977, Jt. Ex. 3; T. 669); Padre Island, Texas (*Id.*); and Mustang Island, Texas (*Id.*).

Commerce began a project which culminated in a bridge. That bridge was severed in 1979 by Hurricane Fredrick.[12] It was rebuilt to its present state in the early 1980's.

The Master determined that the bridge, taken with other factors, was indicative of extension of the mainland status. (Rpt. at 13-14). This determination, similar to many previous ones, was based on testimony in the record. Mr. Armstrong questioned Dr. Reisman, "The presence of the bridge is not indicative of itself, it merely indicates proximity and low water level which permits the construction of a bridge; is that correct?" (T. 2045). Dr. Reisman answered, "And integration in the life of the mainland." (T. 2045-2046). Mr. Armstrong responded, "And access, yes." (T. 2046).

The construction of the Dauphin Island bridge indicates the physical characteristics which surround it. These physical characteristics conversely allow the construction. Joint Exhibit 1-11376, Chart of Mobile Bay, 33rd ed., Sept. 1979, depicts the area in detail (T. 669). *See* Attachment 4. Water depths range from one-half to four feet, excluding the dredged canal.[13] The area is rampant with low tide elevations, washing rocks, stakes, submerged pilings, breakers, oyster reefs, a soft water bottom consistancy and other dangers to navigation (Jt. Ex. 1-11376). These features are readily discernable from a two dimensional chart and the Master apparently considered them when he

[12]Several environmental groups challenged reconstruction of the bridge. The U.S. along with the State was a defendant. The U.S. argued that the status quo would be significantly altered if the bridge were not replaced and that would cause human and economic hardship. The U.S. based this argument on the fact that the bridge had existed for over 25 years and was a link to the mainland for 500 permanent residents (Al Ex. 7-5; T. 1094, 1220).

[13]The U.S. contends a dredge canal is indicative of island separation from the mainland. This is discussed at page 32 below.

decided that the area could not be utilized by international traffic (Rpt. at 16).

The Master did not believe however that the bridge alone made Dauphin Island an extension of the mainland. He based this belief partly on the United States' argument to him that the Florida Keys were not true islands, although in 1969 the United States pointed out to the Court that the Florida Keys were extensions of the mainland because they were linked by a permanent highway. *United States v. Louisiana* 394 U.S. at 71 n. 95. *See* footnote 10 above.

Mr. Albert B. Maris, Special Master in *United States v. Florida*, No. 52 Orig., October Term (1973) apparently agreed with the Government's earlier opinion. He decided for various reasons that the Florida Keys were extensions of the mainland. *See* Report of Albert F. Maris, Special Master at 39. His recommendations were submitted to the Court, but the issue of mainland extension was remanded to the Master because the United States raised related issues which it had not raised before the Master. Accordingly, the Court asked the Master to submit a supplemental report. *United States v. Florida*, 420 U.S. at 533. After the remand the parties settled the case.

Mr. Maris' Supplemental Report, October Term, 1973, explained the settlement. Concerning the pertinent issue, the parties agreed that there was one, no juridical bay in the upper keys *whose closing line affects the seaward limit of Florida's Submerged Lands Act Grant*; two, the waters around the lower keys are *generally territorial seas and not inland water*; and three, there are no inland waters within the lower keys *whose closing lines affect the seaward limit of Florida's Submerged Lands Act grant*. *See* Supplemental Report of Albert B. Maris, Special Master, Appendix A, Stipulation. The Court adopted the Supplemental Report and explained the settlement. The pertinent part of the Court's opinion concludes that the waters within the Keys were within the *Gulf of Mexico* and that there were no inland waters in the lower keys "*the closing lines of which affect the right of the United States or the State of Florida under this decree.*" *United States v. Florida* 425 U.S. 791, 793 (1976) (emphasis added). The issue of mainland extension was never decided. As such, the United States avoided a ruling which would hurt in other pending cases. Once the dividing line between the Gulf and Atlantic was established, Florida was also secure. All the waters in dispute were then within the Gulf and subject to the State's three *league* Submerged Land Act Grant. There was no reason to decide the extension question and it was not decided. The United States is now insisting otherwise.

3. The Court's Extension of the Mainland Factors — The Master's Third Criterion

The Master divided the Supreme Court's approach to this question into two groups. The first is generally whether an inland forms an integral part of a land form. The second is whether an inland satisfies Justice Stewart's test discussed in *United States v. Louisiana* 394 U.S. at 66. The Master believed Dauphin Island satisfied both factors.

a. An Integral Part of the Land Form

Relying on Shalowitz and the Court's note 85 at 394 U.S. 66, the Master determined that Dauphin Island is near, separated from the mainland by so little water that for all practical purposes the coast of the inland is identified as that of the mainland; and is so situated that the waters between them (it) and the mainland are sufficiently enclosed to constitute inland water. (Rpt. at 16 quoting 394 U.S. 66) (parenthetical in original).

The Shalowitz rule for assimilation of islands is that, "The coast line should not depart from the mainland except where the islands form a portion to the mainland . . . *or* they form an integral part *of* a land form." 394 U.S. at 65 n. 85. Because Dauphin Island is not intersected by the headland to headland line for Mobile Bay but is intersected by closing lines for Mobile Bay, the coastline departs from the mainland and embraces Dauphin Island. According to Shalowitz they should not do so unless the inland is a portion to the

mainland or is an integral part of a land form. Dauphin Island is clearly not a portico to the mainland, but it is an integral part of a land form; in this case, Cedar Point, Alabama.

b. Justice Stewart's Criteria for Island Assimilation 394 U.S. at 65 n. 25.

The Master summarized the facts which satisfy Justice Stewart's criteria. The bases of those facts are important.

(1.) Size: Size alone cannot serve as a criteria. It must be considered in relationship to shape, orientation and distance from the mainland (Rpt. at 16). Dauphin Island's size, shape, orientation and distance from the mainland are all results of the unique geographical processes of Mississippi Sound and Dauphin Island. These are discussed throughout the following paragraphs.

(2.) Distance from the Mainland: The parties agree that Dauphin Island is not more than 1.60 nautical miles from the mainland. The Master was correct when he placed this distance in proper perspective. As stated above, the permanent bridge connection indicates the relative closeness of the island with mainland. The geographical factors associated with the bridge confirm the mainland connection.

(3.) Depth and Utility of Intervening Waters: The waters in question are those between Dauphin Island and Cedar Point because there are no intervening waters between Dauphin Island and Mobile Bay. Excluding dredged canals, water travel between the island and mainland would be dangerous. Considering dredged canals there is an alternative route in the Gulf Intracoastal Waterway (GIWW), but this waterway is artificially maintained and would close if not maintained. *See* Mr. John Clark's testimony at 1128, and that of Dr. George Lamb at 784. Both believe if the currents and silt were allowed to operate naturally the canal would over time be filled (T. 784).

(4.) Shape: The Master describes the shape of Dauphin Island but not the underlying processes which create that

shape. Dauphin Island is formed because of its unique relationship to Cedar Point and Mobile Bay. Dauphin Island has a solid core (T. 548). Its western spit is created by sand veneer from the Florida and Alabama *mainland*. Cedar Point, Alabama, was created by currents moving down the west side of Mobile Bay (T. 784). Similarly the eastern end of Dauphin Island is created by currents moving through the entrance to Mobile Bay (T. 784). As stated above, these two points, the first moving south and the second moving north, most probably would connect except for dredging in the GIWW (T. 784).

(5.) Relationship to Configuration or Curvature of the Coast: Dauphin Island plays a part in three circular patterns. The first overall curve flows from the Florida Keys around to Louisiana. The second curve follows a line from St. George Island, Florida, near Panama City, Florida, to the Chandeleur Islands on the Louisiana coast. The final curve is a line from Dauphin Island to Isle a' Pitre, Louisiana. In every instance, Dauphin Island follows the configuration or curvature of the mainland coast.

C. CONCLUSION TO ARGUMENT ONE

For the reasons discussed above, Alabama believes that Dauphin Island is an extension of the Alabama mainland and respectfully requests the Court to accept the Master's Report on this issue.

II. MISSISSIPPI SOUND IS A HISTORIC BAY

Mr. Armstrong *is* the first Special Master to recommend that a body of water, rejected by the United States as a historic bay, is in fact a historic bay. But the Master did not reach this conclusion because he, "winked at the established rules and ignored the posted road signs . . . ." (U.S.

Brief at 22).[13] He is the first because he applied what could be described as the most equitable proposition formulated in these Submerged Lands Act cases. That is:

> The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.

United States v. California, 381 U.S. at 168.

If this principle applies, what weight should be given the United States' disclaimer that Mississippi Sound is not a historic bay? Similarly what weight is there in the United States' argument that the Court should not consider the Government's prior positions? If "little" is the answer, as the Master believed, then this case is quite different from previous ones. The first question to answer then is does the principle apply. If it does the Master was correct to consider facts not heretofore considered.

A. UNITED STATES' DISCLAIMER

This Court has stated that a disclaimer by the United States is not, in all circumstances, determinative of historic bay status. One circumstance is specified in *United States v. California*, 381 U.S. 139 (1969). The Court said, "a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." *Id.* at 381 U.S. 168. In *United States v. Louisiana*, 394 U.S. 11 (1969), the Court explained, "it

[13] In this section of its brief the United States implies that the Master's behavior toward this issue was haphazard and careless. In addition to the above, the U.S. describes the facts the Master utilized as *culled* material (U.S. Brief at 33) (emphasis added). His attention to the case was described as a *casual approach* (U.S. Brief 23) (emphasis added). Alabama believes the record proves the opposite.

would be inequitable in adopting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affiars, by denying any effect to past events." *Id.* at 77.[14] To this the Court notes, "It would be quite [a step] to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit." *Id.* at n. 104 (emphasis in original) (parenthetical added).

The Master decided the United States' disclaimer was extrajudicial. The discussion below serves as a basis for the Master's conclusion — a conclusion manifestly set forth and documented by the record in this case.

1. In the Name of Foreign Policy

Mississippi Sound contains high seas enclaves totally surrounded by state territorial waters. No case ever before this Court has presented this problem and the parties agree that this situation does not generally accomodate the Government's position.[15] Dr. Derek Bowett, the United States' international law expert testified that the enclaves, as a practical matter, do not fit the traditional interests of navigation, fishing, and scientific exploration (Bowett depo. at 36-39). He added that these enclaves would not

[14] Earlier in the same opinion the Court noted that the Government could not abandon a consistent official international stance solely to gain an advantage in a domestic lawsuit. *Id.* at n. 97. Alabama believes this applies more to the question of whether a title has ripened than it does to the question of the effect of the Government's disclaimer.

[15] There were no enclaves in California, Florida or Alaska which were before the Court. There were enclaves in Chandeleur Sound, Louisiana but these were never before the Court for adjudication. The parties settled their differences in this area.

affect the furtherest extension of United States territorial waters, *id.* at 39-40, and that the high seas enclaves would not serve any international purpose of the United States. *Id.* at 97. Placing this problem in the proper perspective, Dr. Bowett testified at trial (and in response to a question from the Master) that he did not know of any presently existing parallel situation anywhere in the world (T. 1916-1917) and that this situation would tend to strengthen a claim of historic waters because it would lessen opposition by maritime powers (T. 1889-1890).

Dr. Louis Alexander, the State Department's geographer similarly testified that if the State's arguments were accepted, United States' territorial waters would not be extended beyond their present point (T. 2380). He did however believe that there was a justification for the Government's position. That justification he said was *foreign policy.* When asked what foreign policy was served by designating high sea enclaves in Mississippi Sound, Dr. Alexander testified:

> I think it is very important that the United States insist on strict adherence to the Articles of the Geneva Convention which will in turn — well, the Geneva Convention since this is still our law, because other countries will take advantage of their interpretations of this and begin closing off, what are to us, may be vital passageways, vital water areas.
>
> We have done this consistently with the straight baseline system and we should do it with all of the articles because of our ability then to protest, vigorously, any slippage, on the part of other nations, of the articles, which they themselves would say they adhere to and then begin to give away.
>
> So that's my answer. I think we — from a foreign policy view, it is important that we maintain, and urge others to maintain, the strictest adherence to the letter of these provisions. *Other than that, there is none.*

Transcript at 2360-2361 (emphasis added).

In this context the Government falls squarely within the Court's first admonition that a foreign policy justification is questionable. The admonition is particularly relevant here because *foreign policy* is the *only* justification for the Government's position.

2. Attempting To Prevent Recognition Of A Historic Title

The Government also violates the Court's second admonition. That is, it should not attempt to prevent recognition of a historic title which may already have ripened. The key phrase here is "attempting to prevent recognition." Alabama maintains that the consistent policy of the Government has been to attempt to prevent recognition.

The United States Baseline Committee began operations in 1970. *See* Joint Exhibit 3 and 99. From 1970 to 1978 the Committee decided the location of Alabama's inland and territorial waters without contact with the state. *See* U.S. answers to Second Interrogation of Alabama, No. 10 and Alabama Exhibit 16-15 (T. 1094, 1226) herein and Exhibit 5 to Alabama's Memorandum in Support of Motion for Supplemental Decree filed February 28, 1980. During this eight year period The United States established its position. Three important trial exhibits may explain why and how the United States attempted to prevent recognition of the State's title.

a. Ad Hoc Committee on Delimitation of United States Boundaries

The June 8, 1970 minutes of the Ad Hoc Committee on Delimitation of United States Boundaries were introduced as Joint Exhibit 3. The full text is contained in Attachment 12. During this meeting some members of the committee were concerned with discrepancies in symbols used on governmental agency maps. One agency official volunteered to look into the matter. The Justice Department representative belived this would delay the Committee's work. The minutes explain the situation and contain this phrase, "the representative of the Department of Justice

indicated that this would necessitate a great deal of time that was not available in light of the present needs of reporting at least tentative U.S. baselines *that could be used in pending domestic litigation . . .*" *Id.* (emphasis added).

b. Letter to the Department of Interior from the Justice Department

This June 6, 1972 letter was introduced as Mississippi Exhibit 101 and its full text appears as Attachment 13. In the letter a Justice Department representative discussed the problems associated with Department of the Interior oil and gas leasing maps. He believed one map depicting Mississippi Sound would create problems. The letter reads in part, "we believe that we should not litigate this question [the rights of Mississippi and Alabama in Mississippi Sound] now." (Ms. Ex. 101) (parenthetical added). The writer concluded that an artificial limit could be used until the Justice Department was ready to litigate. *Id.*

c. Testimony Before The House Committee on Merchant Marine and Fisheries

In 1983 Congress considered amending the Fishery Conservation Management Act, 16 U.S.C. 1821 *et seq.* (1978), to allow states jurisdiction over high seas enclaves located in territorial waters. The Deputy Assistant Administrator for Fisheries from the National Oceanic and Atmospheric Administration, testified before a United States House of Representative Committee studying the amendment. *See* Joint Exhibit 107, appearing as Attachment 14. Mr. William Gordon told the Committee, "*Because some of the enclaves hold valuable mineral resources*, the Administration will not support ceding these areas to the adjacent states. We are, however, prepared to transfer fishery management jurisdiction . . . ." *Id.*

If the above confirms the Master's determination that the Government's disclaimer is extrajudicial then he was correct to decide whether the States' titles ripened prior to and inspite of the United States' disclaimer.[16]

B. THE STATES' TITLES RIPENED PRIOR TO THE GENEVA CONVENTION

At least three factors should be considered to determine historic bay status: one, the claiming nation must have exercised authority over the area; two, that exercise must have been continious; and three, foreign states must have acquiesced in the exercise of authority. *United States v. Alaska*, 422 U.S. 184, 189 (1975). The first two are self-explanatory. The third has been interpreted to mean that a nation may prove that another nation, "knew or reasonably should have known of the authority being asserted." *Id.* at 199. With this qualification, a nation does not have to demonstrate that it physically excluded foreign navigation and

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[16]The effect of the Master's decision that the U.S. disclaimer was extrajudicial distinguishes this case from all others in the standard of proof required. In prior cases where the U.S. disclaimer was valid, the States were required to prove "clear beyond doubt" that an area was a historic bay. Alabama believes it met this standard but it is important to recognize the distinction of this case from all others. The Court said, "We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. *U.S. v. California* 381 U.S. at 175.

The Court was clear in saying that *if* there was a federal disclaimer *then* the State must prove title "clear beyond doubt". Where the Master found that the U.S. was attempting to prevent recognition of a title which may already have ripened but which is called into question for the first time in a domestic lawsuit, surely the standard is something less. When a federal disclaimer is not valid, a more appropriate standard might be "preponderance of the evidence." Because this issue is one of first impression there are no specific guidelines.

other presence from an area. *Contra.* U.S. Brief at 21.[17] This is particularly important where the physical characteristics of the area strictly prohibit international traffic. See Master's report at 35-36 where he characterizes Mississippi Sound as a *cul de sac* too shallow for ocean going vessels. See *also* the testimony of Mr. John Clark, Master Mariner, Executive Director of the Mississippi State Port Authority, former President of the Board of Commissioners of the Port of New Orleans, former director of the Port of Monrovia, Liberia, a director of the Panama Canal Commission, and technical advisor to the United States' delegation on the Law of the Sea. Mr. Clark opined that because of the physical limitations in Mississippi Sound the area cannot serve as a route for international shipping because ocean going vessels engaged in foreign trade cannot navigate outside of artificially created channels (T. 1132-1133) and that the cargos carried on the GIWW were purely domestic (T. 1136).

Similarly, a nation does not have to meet the stringent standard of "adverse possession" as the Government suggests. By definition, adverse possession attaches to real property. Physically a nation is not able to adversely possess submerged lands, particularly the ones of the magnitude disputed in this case. Consequently the standard is not appropriate here.

1. Exercise of Authority and Notice to the World

The parties agree that predecessor nations occupying Mississippi Sound did not acquiesce in each other's exercise of authority over the Sound. *See* U.S. Brief at 24. This is a necessary ingredient in the historic bay puzzle. If there were no dispute over the property before the United States

[17]Even if a nation is required to exert force to exclude foreign navigation the standard may not be as stringent as the United States suggests. *See* comment by Justice Blackmun that Justices Stewart and Rehnquist would have affirm the District Court's ruling that Cook Inlet, Alaska was a historic bay. 422 U.S. 184, 204 (1975).

exercised authority over the area, it would be impossible to prove assertion of authority. But here the French, Spanish and British frequently clashed over the territory. This resulted in a succession of treaties. Chief Justice Marshall discussed them in *Foster and Elam v. Neilson*, 2. Pet. 253 (1829). His detailed analysis can be summarized as follows:

> At the commencement of the War of 1756, France was the undisputed possessor of the Province of Louisiana lying on both sides of the Mississippi and extending eastward beyond the bay of Mobile. Spain was in possession of Florida. The Perdido River, the current boundary between Alabama and Florida separated Spanish and French possession. *Foster and Elam v. Neilson*, 2 Pet. 253, 300 (1829). At the Treaty of Paris on February 10, 1763, France ceded, "the river and port of the Mobile, and all her possessions on the left side of the river Mississippi, except the town of New Orleans and the island on which it is situated," to Great Britain. By the same treaty Spain ceded Florida to Great Britain. *Id.* at 300-301. By a secret treaty the residue of Louisiana was ceded to Spain by France. On September 3, 1783 at the Versailles Treaty of Peace, Great Britain ceded East and West Florida to Spain. Seven years later at St. Ildefonso, Spain, and France entered a secret treaty where Spain ceded to France territory described as, "the Colony or Province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it . . . ." *Id.* at 301. On April 30, 1803 the United States acquired Louisiana from France. The territory was described as "the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty St. Ildefonso concluded with his Catholic majesty." *Id.*
>
> After the United States acquired the territory from France, Congress passed an Act on October 2, 1803 allowing the President to take possession of the territory. 2 Stat. 245. A surrender was arranged but no actual possession was taken. *Foster* at 303. On March 26, 1804 Congress

divided the area of the Louisiana Purchase to create the Territory of Orleans and to enlarge the Mississippi Territory south of the 31st degree of north latitude. 2 Stat. 283. The United States however still did not exercise physical possession because actual possession was with Spain. *Foster* at 304. Appropriately Spain objected to the United States assertion of authority. *Foster* at 305.

In response to Spain's 1811 European difficulties, Congress resolved that the United States could not afford to see any part of the Floridas fall into foreign hands. 2 Stat. 411. An appropriate Act was passed to enable the President to take possession of and occupy , "all or any part of the territory lying east of the river Perdido, and south of . . . the Mississippi Territory. 2 Stat. 411 (Jan. 15, 1811). On May 14, 1812 Congress went one step further, still in defiance of Spain's claim to the southern portion of Alabama and Mississippi, and enlarged the boundary of the Mississippi Territory and annex to the United States the area south of the 31st degree north latitude and west of the Perdido River. 2 Stat. 734. An Act followed a year later which authorized the President to occupy and hold the same, "not now in possession of the United States". 2 Stat. 472 (Feb. 12, 1813). This area comprised part of the Alabama Territory which was subsequently established on March 3, 1817, 3 Stat. 371, and made a State on December 14, 1819 (3 Stat. 608).

Chief Justice Marshall commented on the above succession:

> After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, *to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations.* If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have *unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty;* if the Legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the Legislature. *Foster* at 2. Pet 309 (emphasis added).

Regarding Spain's reaction to the United States' initiatives the Chief Justice added:

> It is well known that Spain had uniformly maintained her construction of the treaty of St. Ildefonso. His Catholic Majesty had perservingly insisted that no part of West Florida had been ceded by that treaty, and that the whole country which had been known by that name still belonged to him. *Id.* at 310.

But Chief Justice Marshall concluded:

> The United States had uniformly denied the title set up by the crown of Spain; had insisted that a part of West Florida had been transferred to France by the treaty of St. Ildefonso, and ceded to the United States by the treaty of April, 1803; had asserted this construction by taking actual possession of the country; and had extended its legislation over it. The United States therefore cannot be understood to have admitted that this country belonged to His Catholic Majesty, or that it passed from him to them by this article. *Id.* at 301-311.

The inescapable conclusion is the United States exercised authority over this disputed area contrary to the wishes of Spain.

2. Acquiescence and Notice to the World

Ten months before Alabama became a state the United States and Spain signed the Treaty of Amity, Settlement and Limits on February 22, 1819, 8 Stat. 252. The ratification process lasted two years and the treaty was proclaimed

on February 22, 1821. As proclaimed it reads "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the Eastward of the Mississippi, known by the name of East and West Florida." *Id.* at Art. 2.

By this international treaty, Spain acquiesced in the United States' exercise of authority, the purest form of notice to the world. No nation could deny that it did not know or should not have known of the United States' exercise of authority and of Spain's acquiescence. At this moment in time the world was placed on notice. This would never again be necessary. To complete the process all the United States needed to do was to confirm that the subject area include the waters of the Mississippi Sound, and to continue its exercise of authority. These two points may be addressed simultaneously.

3. Continuous Exercise of Authority

a. Foreign Nations' Perspective

Probably with little disagreement, historians would characterize the larger eighteenth and nineteenth century nations as maritime powers. Water commerce was practically the only means of commerce. Accepting this as the general rule it is predictable that Alabama's and Mississippi's predecessor occupants utilized the enclosed waters of Mississippi Sound as a commercial route and considered them part of their territories. The Master found, without qualification of that, "during the period from 1756 to 1819 what is now Mississippi Sound was apparently considered by whatever nation possessed the surrounding mainland

and islands as part of its possession." (Rpt. at 28).[10] *See* Joint Exhibit 50-4 for Great Britain's description of the waters involved and the transcript at 325 for a similar description for France. *See also* Alabama's Brief in Support of Exceptions for the appropriate importance which should be given to the British boundary description which Great Britain interpreted to include all streams, ports, rivers and *arms of the sea.*

b. The United States' Perspective

(1.) Congress

Long before Spain acquiesced, Congress began to exercise authority over the waters of Mississippi Sound. On February 24, 1804, Congress established a Mississippi Customs District to include, "the territories ceded to the United States by the treaty above mentioned, and also all the navigable waters, rivers, creeks, bays, and inlets, lying within the United States, which empty into the Gulf of Mexico, east of the river Mississippi . . . ." 2 Stat. 250, 252

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[10]The U.S. rejects the Master's conclusion for basically two reasons (U.S. Brief at 24). First that the Spanish, French and British considered even larger portions of the water area to be within their possession. One example complained that the Spanish were said to have exerted authority over the entire Gulf of Mexico. Of course this is not surprising in that at one time Spain controlled all the land area which is now Florida, Alabama, Mississippi, Louisiana, Texas and Mexico. The important fact is that these nations did consider the Sound to be within their possession. If a converse situation had existed, the U.S. may then be correct.

Secondly, the United States contends the issues of this case were decided in *United States v. Louisiana*, 363 U.S. 1 (1960) (U.S. Brief at 25). In 1960 the issue was whether similar evidence established the State's historic *sea boundary* six leagues into the Gulf of Mexico. The Court decided the facts in light of *that* issue not the present issue. Alabama's claim was rejected because its Act of Admission did not contemplate territorial seas. *Id.* at 68. The court did not establish Alabama's land boundary or coastline and so stated. *Id.* at 83 n. 139. *See* Alabama's Brief in Support of Exceptions at 3-4.

(1804). Congress further provided if necessary, a separate district could have been formed which comprised, "the shores, waters and inlets of the bay and river Mobile, and of the other rivers, creeks, inlets and bays emptying into the Gulf of Mexico, east of the said River Mobile, and west thereof to the Pascagoula inclusive . . . ." *Id.* at 254.

This incorporation was confirmed by a United States House of Representatives committee studying the President's message on roads and canals. House document 427 reads:

> That the interior of the United States, co-extensive with its territory, furnish the ample and the only effectual means of such facility. Without inland navigation, an interior commerce, in a large portion of the most necessary articles, would be not merely inconvenient, but wholly impracticable, between sections remote from each other. Those which were destitute must remain so; and where there was abundance, it would be of little value. In such a state, of all the rich bounties of nature distributed over our expanded country, ever varying in their nature and uses with our varied soils, climates, and pursuits, a scanty portion only could be appropriated to the subsistence and comfort of civilized man. Invaluable, then, are those interior waters which, even in their natural state, afford a facility of transportation of the necessaries of life which no other known means could effect. But, although these waters are thus essentially requisite and extensively useful in their original state, their usefulness would be indefinitely increased by improving and uniting their channels.

H.R. Doc. No. 427, 14th Cong., 2nd Sess. (1817) at 420. Congress wanted to include in the above interior water communications a canal, if practicable, "from the Altamaha and its waters to Mobile, and from thence to the Mississippi." *Id.* at 422, Al. Ex. 17-6. As the Master reported, this became the Gulf Intracoastal Waterway.

In succeeding years Congress maintained its belief that Mississippi Sound was inland waters. In 1822 the House of Representatives studied whether to establish a fort on Dauphin Island. Some of the considerations were:

> The report of the engineers states that the object of forts on Mobile Point, and on the eastern point of Dauphin Island, are, to prevent the enemy from occupying them as places of refuge; to prevent the mouths of the river from being blockaded; to secure the communication between New Orleans and Mobile Bay.

H. R. Rep. No. 51, 17th Cong., 1st Sess. (1822) at 3, A.L. Ex. 17-7; T. 1094, 1227; and,

> It will, also, as they say, prevent an enemy from establishing themselves on Dauphin Island, by cutting a communication between Lake Pontchartrain and Mobile Bay, while the fort will serve as a depot for naval stores, and for the stores and armament necessary for the protection of the coasting trade.

Id.; and,

> to secure the communication between New Orleans and Mobile bay by lake Pontchartrain, and *the little interior sea, comprised between the main and the chain of islands, bounded by Cat Island to the west, and Dauphin Island to the east.*"

Id. at 7 (emphasis added).

In the same year Congress described Mississippi Sound, when compared to the Mississippi river as, "the only other practical communication with the sea, to wit, that through Lake Pontchartrain, Pass Christian, and within the chain of islands to Mobile Bay . . . ." American State Papers, No. 22, 17th Cong., 1st Sess. (1822) at 371 (A.L. Ex. 17-8; T. 1094, 1027).

Congressional concern over the defense of Mississippi Sound continued for another 18 years. In 1840 Senate Report 490 contained:

> The third and last station is Dauphin Island, and

> is important. The vessel here should also be a schooner, to draw not more than six feet of water, to be able to navigate the channels between the Islands and the mainland. *Her duty should be to protect the extensive coasting trade between New Orleans, Mobile, and to watch and guard Mobile Bay*, and its tributary streams — and in fact the line of coast from Mobile Point to Lake Borgne. Passe Heron [between Dauphin Island and Cedar Point, Alabama] or its vicinity might be her permanent station, from which one or two boats should always be cruising to the *westward*, and one kept with herself to watch and guard the Bay.

S. Rep. No. 490, 26th Cong., 1st Sess. (1840) (as an attachment to that report) at 3 (Jt. Ex. 138; T. 699) (parenthetical added) (emphasis added).

In 1850 the Senate again studied Mississippi Sound and described it as:

> The broad sheet of water which lies between the coast of Mississippi and the chain of islands parallel to it, is the channel of a commerce important in peace and indispensable in war. Through this passes the *inland navigation which connects New Orleans and Mobile.* This is the route of the mails and of a large part of the travel between the eastern and southwestern sections of the Union.

S. Rep. No. 23, 31st Cong., 1st Sess. (1850) at 2 (Al. Ex. 17-12; T. 1094, 1227) (emphasis added).

Recognizing this importance Congress asked for charts of the area. One of the reasons given was:

> In many respects Mississippi sound is one of the most important bodies of water on the Gulf coast of the United States. Secure from the heavy seas of the Gulf of Mexico, with sufficient depth of water throughout its length, it furnishes a safe transit for steamers carrying the mails between Mobile and New Orleans.

H. R. Ex. Doc. No. 58 36th Cong., 1st Sess. (1860) at 2 (Al. Ex. 17-13; T. 1094, 1227).

These documents demonstrated not only that Congress considered Mississippi Sound to be inland waters but also that before and at all times after the United States 1819 treaty with Spain, the United States position has been that these waters were part of the 1803 Louisiana Purchase.

(2.) The Solicitor General

The Master concluded that "for more than half a century it was accepted by the United States that . . . Mississippi Sound was inland waters." (Rpt. 32-33).[19] This conclusion is based on the United States concession in 1958 that Mississippi Sound was inland waters. To this the United States writes:

> The 1958 brief was apparently the first occasion on which the United States specifically addressed that question. And the stance then taken barely survived the decade. In 1961 the United States ratified the Convention on the Territorial Sea which, as this Court soon held, required the explicit drawing of straight baselines to accord inland water status to areas screened by islands that do not qualify under the bay rules. *United States v. California*, 381 U.S. at 167-169; *Louisiana Boundary Case*, 394 U.S. at 67-71. Having marked no such straight baselines enclosing Mississippi Sound on its official charts, the United States was at least impliedly recanting any claim to the Sound as inland.

United States brief at 31 (citation omitted).

These documents demonstrated not only that Congress considered Mississippi Sound to be inland waters but also that before, and at all times after, the United States 1819 treaty with Spain, the United States' position has been that these waters were part of the 1803 Louisiana Purchase.

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[19] Prior positions of this type have not been considered before. The Master considered them here because he discounted the U.S. disclaimer. This is a major difference between this action and previous ones.

and Mississippi in the *inland waters* of Lake Borgne and Mississippi Sound; it did not decide the width of the maritime belt of either State in the Gulf." Brief for the United States in Support of Motion for Judgement, *United States v. Louisiana*, No. 11, Orig. October Term (1956) at 17 (emphasis added). Ir. the same brief the United States wrote, "the issue there [Louisiana v. Mississippi] was the location of the boundary between Louisiana and Mississippi in Lake Borgne and Mississippi Sound. *Those are inland waters*, as the court specifically held in applying the thalweg rule to them." *Id.* at 128 (parenthetical added) (emphasis added).

The present United States description of its 1958 concession as an "improvident error of counsel in a single sentance" is equally incorrect. The document cited as Brief in Support of Motion for Summary Judgement on Amended Complaint contains far more than a one sentence "error". The established position of the United States was that the Mississippi Sound was inland water. The Government wrote, "*Louisiana v. Mississippi* . . . did no more than locate the boundary line between those states in *the inland waters of Lake Borgne and Mississippi Sound* . . . ." *Id.* No. 11, Orig. October Term (1957) at 18 (emphasis added). Later in the same brief there is this statement concerning *Louisiana v. Mississippi*, "the map inserted at [202 U.S. 58] extends eastwards only to the 89th meridian, and is entirely within *inland waters*." *Id.* at 179 (emphasis added). In reference to Mississippi the Government adds, "all the water- . . . situated in Mississippi is in Mississippi Sound which this Court has described as *inland water*." *Id.* at 254 (emphasis added). In reference to Alabama, a similar statement reads, "the water between the islands and the Alabama mainland is *inland water* . . . ." *Id.* at 261 (emphasis added).[20]

[20]During this time period G. Etzel Pearcy, Geographer for the State Department located Alabama's coastline along the barrier islands. *See* Alabama's Brief in Support of Exceptions at 17.

Between 1956 and 1968 the Court recognized the United States' position that Mississippi Sound was inland waters and that these waters passed to the States under the grant of *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). *United States v. Louisiana*, 363 U.S. 1, 66 n. 108. (1960). Some time before 1968 however the United States changed its position toward the State of *Louisiana*. The Court accepted this change and attributed it to a concession unique to Louisiana. *See* 394 U.S. at 73, n. 97, where the Court describes the earlier concession affecting Louisiana as one "which appears to have been made primarily for purposes of reaching agreement on the leasing of the submerged lands pending a final ruling on their ownership." There are no agreements of this or any type concerning Alabama and Mississippi, and consistently the United States still maintained some eight years after signing the Geneva Convention, in 1968, that Mississippi Sound was inland water. The Government wrote:

> Louisiana cites a variety of materials to support its contention that a bay may be created by the presence of islands in the open sea. Many of them, however, relate to islands in the mouth of an indentation — an entirely different matter. *Mississippi Sound, referred to by Louisiana is such a situation.*

Reply Brief for the United States, *United States v. Louisiana*, No. 9, Orig., October Term (1968) at 30 (citations omitted) (emphasis added).[21]

If estopple applies in any situation it applies here. If the United States had made its position clear, Alabama could have litigated this question some 15 years ago. Prior to the United States' Baseline Committee this task would most assuredly have been simpler. In addition, some of the individuals who established current United States policy have

[21]Dr. Pearcy reached this same conclusion in 1959. *See* Attachment 15 herein.

died, making an attack on that policy difficult (particularly where some of those individuals agreed with Alabama's position prior to the Government's current policy.) But even though this case can be distinguished (especially from Louisiana because it does not involve a stipulation to allow leasing) Alabama assumes that the Court will not apply estopple. Based on that assumption the United States is free to deny its past positions; but if, as the Master found, that denial is extrajudicial, then it was the Master's duty to go behind the denial and determine whether the States' title had ripened. In that sense, prior United States' positions are relevant and legitimate interpretations of the facts.[22]

(2.) Louisiana v. Mississippi

In *United States v. Louisiana*, 363 U.S. 1, 66 (1960) the Court described Louisiana's boundary line as a line, "down the middle of the river Iberville, 'to the Gulf of Mexico' not into it for any distance." The Court said, "The State is thence to be bounded 'by *the said gulf*' not by a line located three leagues out in the Gulf....." *Id.* (emphasis in original). In *Louisiana v. Mississippi* the Court described the same line as it divided Louisiana and Mississippi as:

> the deep water channel sailing line emerging from the most eastern mouth of the Pearl river into Lake Borgne and extending through the northeast corner of Lake Borgne, north of Half Moon or Grand Island, thence east and south through Mississippi Sound, through South Pass *between Cat Island and Isle a' Pitre, to the Gulf of Mexico* . . . .

Id. at 202 U.S. 58 (emphasis added).

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[22]The United States contends these facts do not indicate notice to the world. Alabama maintains first that they do but second that they are interpretations of the international position of the U.S. in 1819 *when it signed the Treaty of Amity with Spain*. The U.S. exercised authority over Mississippi Sound and *gave notice to the world of that exercise in 1819*. From that point on the U.S. position has been one of continuous exercise of authority.

If these two conclusions are to agree then Mississippi Sound must be inland waters separate and distinct from the Gulf of Mexico.[23] The question is, did the Court find the waters to be inland: yes. Mississippi Sound was described as, "an enclosed arm of the sea, wholly within the United States . . . ." *Id.* at 202 U.S. 48. This description has specific meaning as the Court later explained. Citing *Louisiana v. Mississippi*: The Court wrote:

> It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays *and other enclosed arms of the sea* along its coast, *and a marginal belt* of the sea extending from the coast line outward a marine league or 3 geographical miles.

Cunnard v. Mellon, 262 U.S. 100, 122-123 (1922) (emphasis added).

---

[23]The U.S. maintains that even if this is true the Government is not *bound* by the *holding* in the case. The Master agrees. Alabama contends that if the U.S. is not bound by the holding it should be bound by the facts the Court held to be true. In this light Alabama respectfully directs the Court to the case of *Florida v. Georgia* 17 How. 478 (1854) which had as its sole issue whether the U.S. would be bound by an adjudication of two states' dividing line if the Government were or were not allowed to intervene in the action. The Court said, "But, under our government, a boundary between two States may become a judicial question, to be decided in this court.

For further explanation the Court cited Wheaton's, International Law in *Cunnard*. The fifth english edition reads:

> *The maritime territory* of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. *The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league*, or as far as a cannon shot will reach from the shore along all the coasts of the State.

Phillipson, Wheatson's Elements of International Law, 5th Ed. (1916) at 282 (emphasis added).

If *Louisiana v. Mississippi* has no other application now, the Court's determination of the location of the State's boundary line should be upheld. If it is not, the Louisiana-Mississippi boundary would be relocated north of its present position.[24]

Footnote 23 continued — And when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and *that decision when pronounced, is conclusive upon the United States as well as upon the States that are parties to the suit. Id.* at 494 (Footnote omitted) (emphasis added).

[24]The U.S. asked Dr. Reisman whether a decision of the highest Court in a nation could provide sufficient notice for a historic claim (T. 2036). Dr. Reisman answered:

> Of course. Of course. And, in fact, decisions of the highest court are published and have been published by a group in England since the beginning, I think, of the second decade of the century, by Arnold McNair and Lauterpathd because these decisions were deemed to be a source of international law.
>
> Diplomats and consul regularly monitor judgments of courts and on occasion these judgments serve to stimulate denial of justice in diplomatic protection or diplomatic notes of protest.
>
> A number of maritime boundary issues were in fact stimulated by decisions of the highest courts. It's certainly deemed to be notice in a form of claim.

Transcript at 2036-2037.

C. CONCLUSION TO ARGUMENT II

The United States exercised continuous authority over Mississippi Sound from the 1803 Louisiana Purchase to at least 1968. The Government gave notice to the world of its intentions in an international agreement with Spain in 1822. At the time of that treaty, at least France, Spain and Great Britian considered the waters of Mississippi Sound to be within the treaty's jurisdiction. From that treaty the United States exercised authority over the area in accord with its principles of inland water status and in its international positions on inland water questions. The Court confirmed this authority and determined the subject waters to be inland in 1906.

CONCLUSION

Alabama respectfully maintains that the Master's Report is correct and that his recommendations should be upheld.

Respectfully submitted,

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Robert A. Macrory
Special Assistant Attorney General

PROOF OF SERVICE

I, Benjamin G. Cohen, Special Assistant Attorney General for the State of Alabama and a member of the Bar of the United States Supreme Court, hereby certify that all parties to this action required to be served have been served with three copies of the *Reply Brief of the State of Alabama*, on this 11th day of August, 1984, by placing said copies in the United States mail, postage prepaid and properly addressed to:

Donald Carr, Esquire
Attorney, Department of Justice
Todd Building, Room 639
Washington, D.C. 20530

Jim Bruce, Esquire
Special Assistant Attorney General
State of Mississippi
Post Office Box 37
Kennet, Missouri 63857

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Special Assistant Attorney General
400 Riverhill Tower
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Jackson, Mississippi 39216

ATTACHMENT 1
TRANSCRIPT PAGES 1740 TO 1741

THE COURT: Let me interject one question there. One of the documents that you referred to, if I remember correctly, spoke of Dauphin Island as being in Mobile Bay?

A. Yes, sir.

THE COURT: Would you agree with that?

A. No, I wouldn't. I think that that description of Mobile Bay was rather like some of the descriptions of Pascagoula Bay that I discussed with counsel yesterday. Because in that description that you recall, and I recall as well, not just Dauphin Island but Petit Bois Island was also described as being in Mobile Bay. And I think that would have exceeded what normally would have been viewed as Mobile Bay. Just as Pascagoula Sound or Pascagoula Bay at times got spread all the way from Ship Island to Dauphin Island, I think, was an exaggeration and did not last as a place of designation.

THE COURT: Where an island lies within the mouth of a bay, would you consider that as lying in the bay?

A. I would say if more of it lay on the bay side of a closing line, yes. Beyond that I'm not sure I know what to answer.

THE COURT: In other words, under your interpretation an island does not necessarily have to be completely surrounded by a body of water to lie within it?

A. Well, in this case, of course, it would be completely surrounded by water, either by water of the bay or water of the sea into which the bay emptied. To be an island, normally it would have to be completely surrounded by water.

THE COURT: Certainly completely surrounded by water.

A. Yeah.

THE COURT: But a particular body of water I'm speaking of.

A. I don't think that makes a great deal of difference, no, sir.

THE COURT: Whether it's completely surrounded by --

A. By one body or another, just so long as it's water.

THE COURT: Would you say it lay in both of them then?

A. It could be described that way. I know that in another case in which I'm involved this very same question is hotly debated, whether an island in the Savannah River or on the Savannah River, whether the Savannah River is completely surrounding it or the Savannah River is only on one side and some other water body on the other. It's a very sticky problem.

THE COURT: I don't want to press the point but would it be your interpretation that it lay in both of them or that it could be said to lie in either of them?

A. I would say that it lay in both of them if it was washed -- if we had an island here which was forming part of that closing line. I would say that it would be washed by both the bay and the other body of water and -- what were the two words you used, sir?

THE COURT: Both and either.

A. Yeah, I would say that it was in both in that case.

ATTACHMENT 2

FACSIMILE OF FIGURE FIVE FROM ALABAMA'S POST-TRIAL BRIEF

EDITOR'S NOTE

PAGES MAP 1 THRU MAP 10 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.



STATE OF ALABAMA

DEPARTMENT of CONSERVATION and NATURAL RESOURCES

ENGINEERING SECTION

BASE MAP FOR CERTAIN DEMONSTRATIVE EVIDENCE

Survey

Drawn R.A.M.

Approved

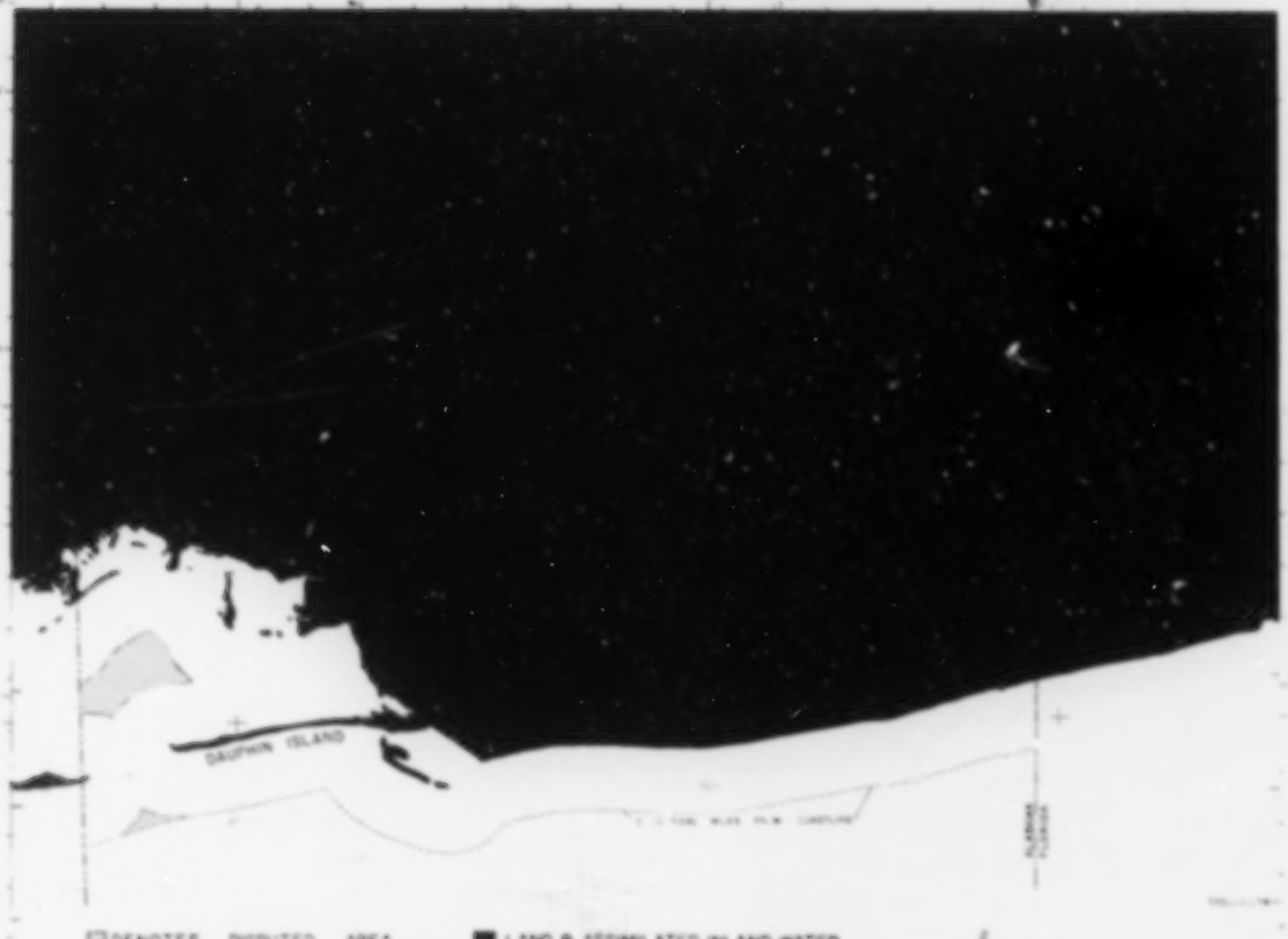
Map of

Date

Dwg. No. B-L-108

ATTACHMENT 3

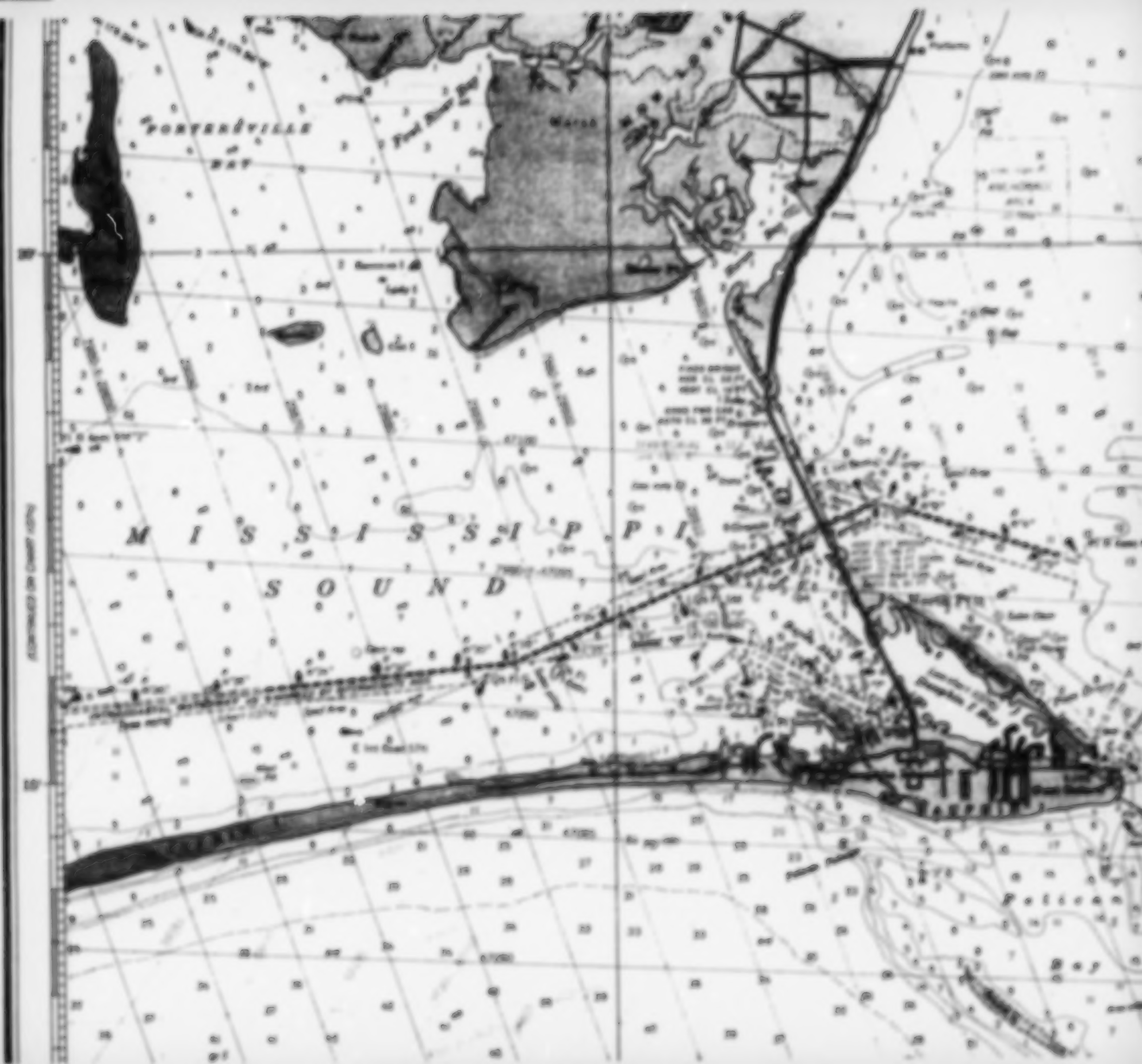
FACSIMILE OF FIGURE SIX FROM ALABAMA'S POST-TRIAL BRIEF

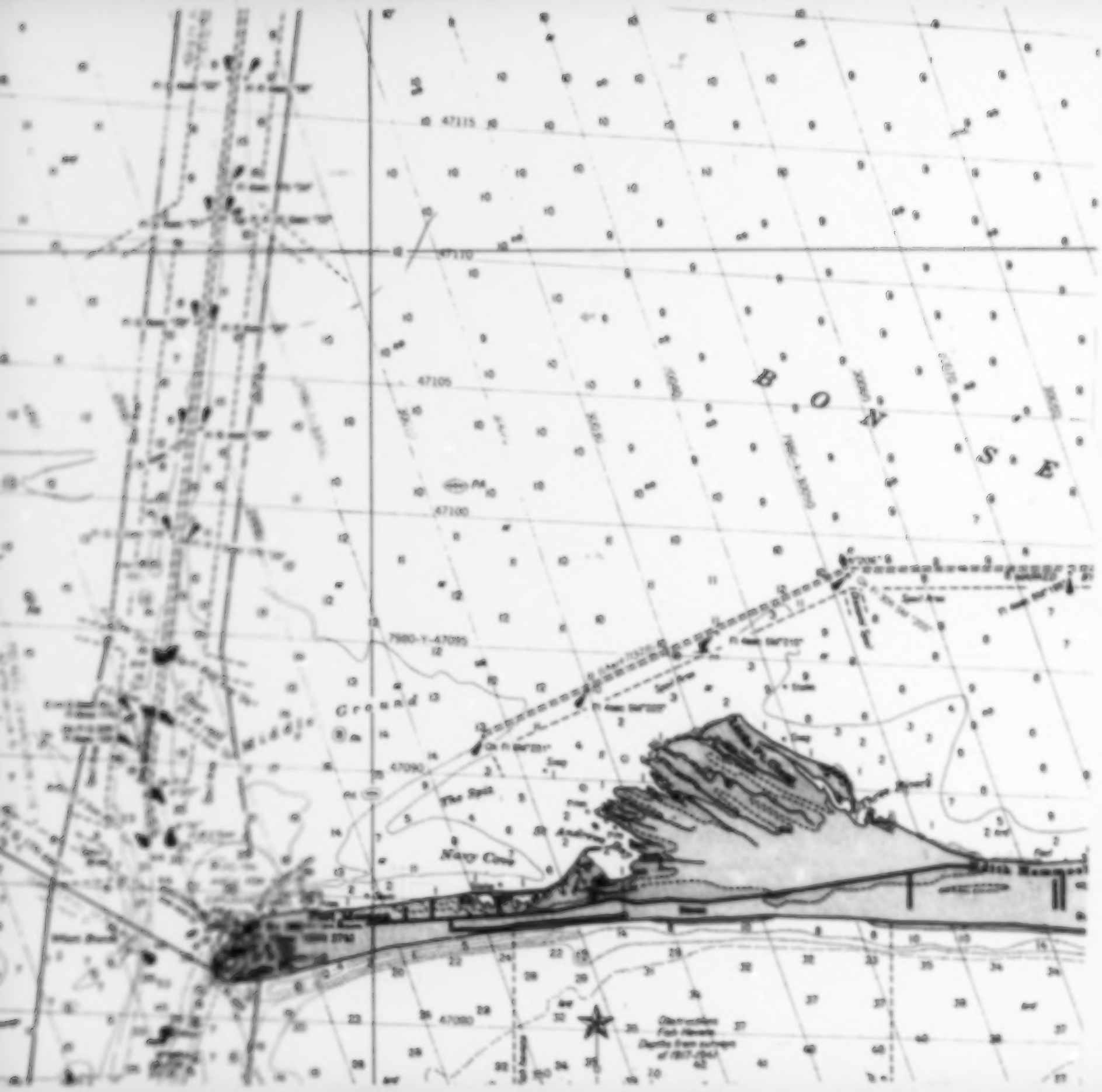

DAUPHIN ISLAND
DENOTES DISPUTED AREA
LAND & ASSIMILATED INLAND WATER

ATTACHMENT 4

CHART 11376
MOBILE BAY, ALABAMA

(JOINT EXHIBIT 1-11376)


PONTCHARTRAIN
BAY
MISSISSIPPI
SOUND


47115
47110
47105
47100
7980-Y-47095
47090
47080
B O N S E
Ground
The Spit
Navy Quay

ATTACHMENT 5

CHART 1274
LAKE PELTO-TERREBONNE BAY-TIMBALIER BAY, LOUISIANA
(JOINT EXHIBIT 1-1274)



ATTACHMENT 6

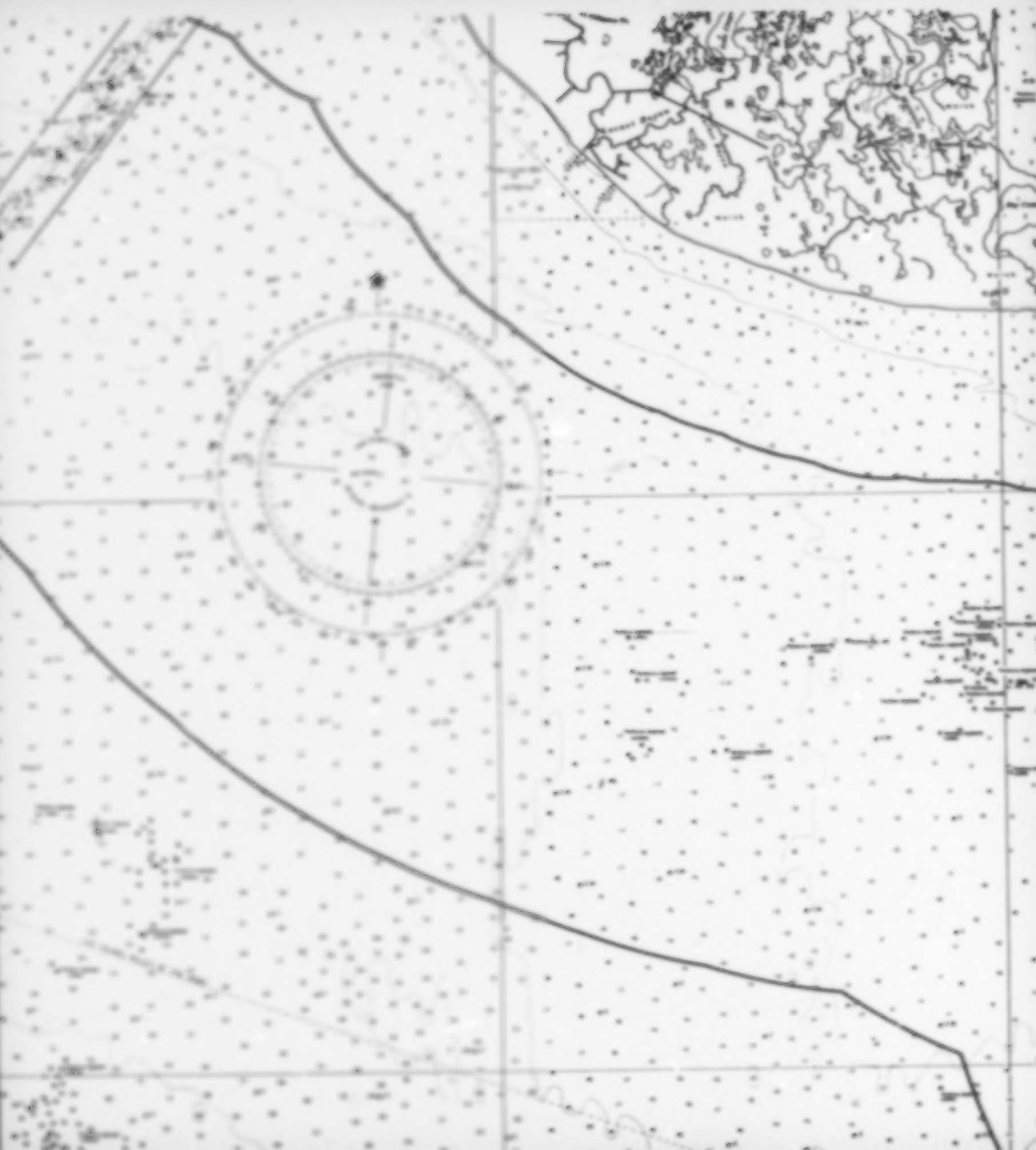
FIGURE 43 FROM APPENDIX I TO THE EXCEPTIONS OF LOUISIANA TO THE REPORT OF THE SPECIAL MASTER FILED MAY 13, 1974

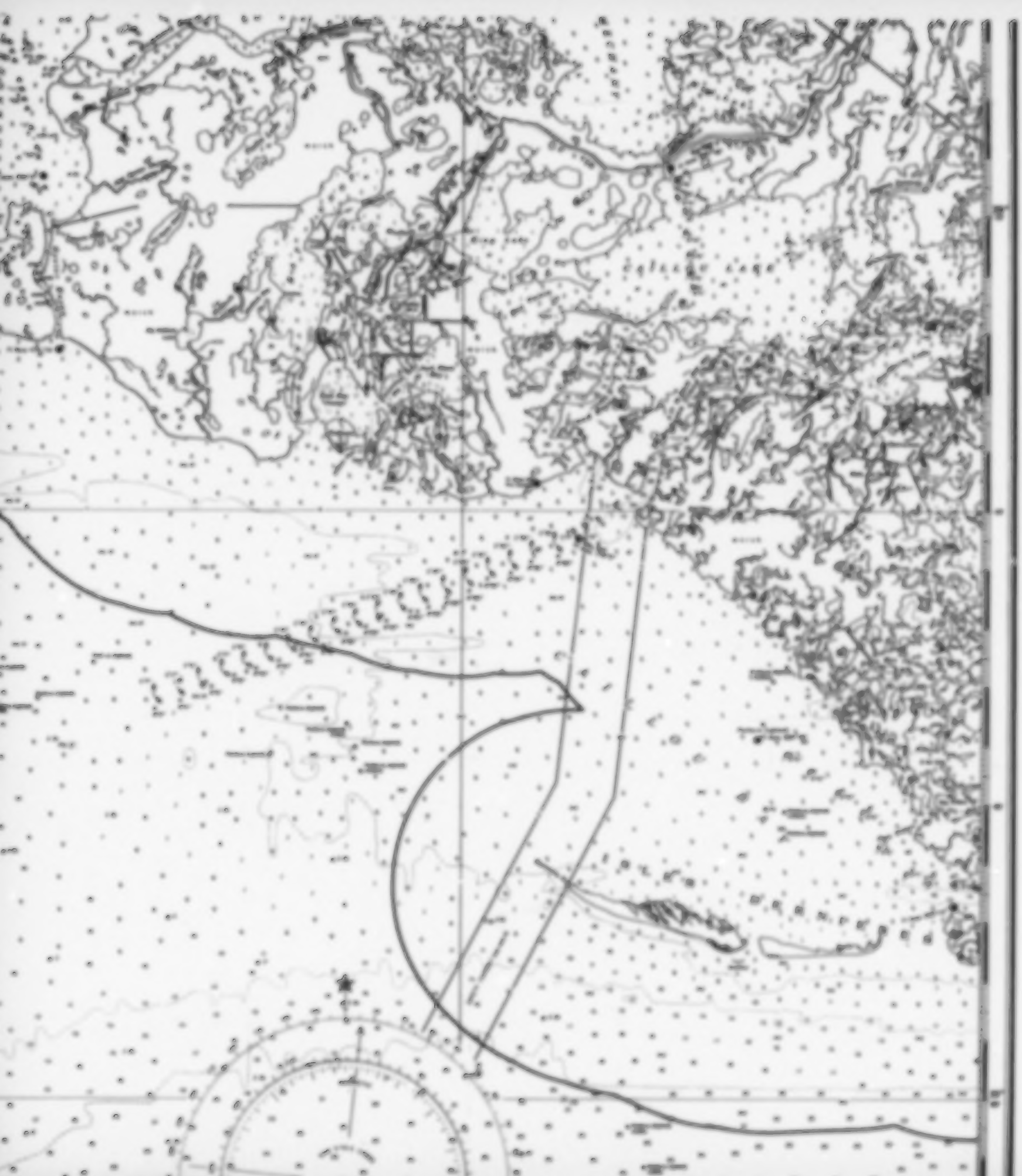
Figure 48. Partial Summary of Caillou Bay Evidence. *Figure C-2 from Louisiana Brief*, Volume V, Part 6, following page 8.

ATTACHMENT 7

CHART 1275
CAILLOU BAY, LOUISIANA

(JOINT EXHIBIT 1-1275)





ATTACHMENT 8

CHART 1274
LAKE PELTO-TERREBONNE BAY-TIMBALIER BAY, LOUISIANA

(WITH THE ISLES DERNIERES, TIMBALIER ISLAND, AND EAST TIMBALIER ISLAND ELIMINATED)





ATTACHMENT 9

CHART 11352

LAKE PELTO-TERREBONNE BAY-TIMBALIER BAY, LOUISIANA

(JOINT EXHIBIT 1-11352)

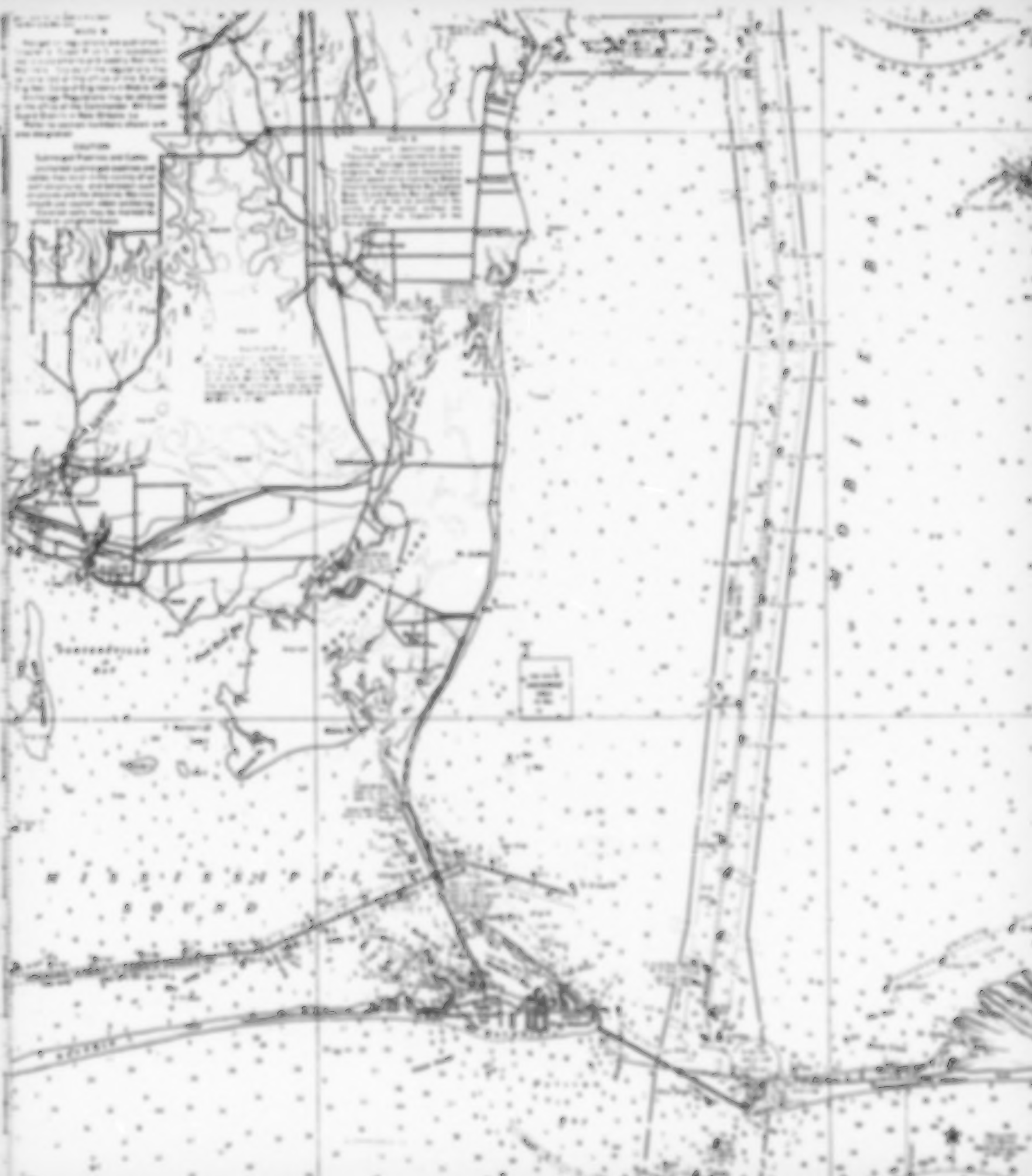

LAKE BARRE
TERREBONNE
BAY


LAKE
RACCOURCI
CHILO BRICE
BAY

ATTACHMENT 10

CHART 1266
MOBILE BAY, ALABAMA

(JOINT EXHIBIT 1-1266)





ATTACHMENT 11

CHART 11363

GARDEN ISLAND BAY — RED FISH BAY, LOUISIANA

(JOINT EXHIBIT 1-11363)


Bloomfield Bay
Bloom Bay
Burrell Bay
E S T
B A Y
E A S T
B A Y


GARDEN I BAY

ATTACHMENT 12

BASELINE COMMITTEE MINUTES OF JUNE 8, 1970

(JOINT EXHIBIT 3)

AD HOC COMMITTEE ON DELIMITATION OF UNITED STATES BOUNDARIES

MINUTES OF JUNE 8, 1970, MEETING AT 10:20 A.M.

PARTICIPANTS:

Department of State:	Dr. Robert D. Hodgson (Geographer) 101-22022 Horace P. Shamwell (Legal Adviser's Office) LCDR Karl Wm. Kieninger (SFW)
ESSA:	H. J. Dolan 146-8066 Ted Smolker
ESSA/CNGS:	Capt. J. O. Boyer 146-8741 J. F. Richardson
Coast Guard:	Lt. M. W. Reed 118-67070 Capt. G. H. Patrick Burnley
Department of Justice:	Jonathan I. Charney
Department of Commerce:	R. B. Ellert

This was the second informal meeting of the Committee which as yet has not been formally organized under the Law of the Sea Task Force. All the agencies presently represented on the Committee were present at the meeting. The Chairman, Mr. Shamwell, commented to the group that he had not yet seen the reply letter from the Secretary of Commerce approving the Secretary of State's establishment of the committee under the Law of the Sea Task Force. He expressed the hope that this letter would be forthcoming in the near future so that the committee's work would proceed on a formal basis.

The representatives of ESSA expressed concern that the committee's functions were not consistent with the statutory authorities of the various agencies represented. In

particular, they expressed concern that the committee would assume the cartographic functions of ESSA with respect to the drawing of U.S. baselines. The representative of the Department of Justice indicated that it was his understanding (and this understanding was confirmed by other members of the committee) that the Ad Hoc Committee would take up where the drawing of baselines had been left off when certain discrepancies were discovered in the interpretation of ESSA's symbols, i.e., would consider the documents drafted by the Department of State's Geographer, Dr. Hodgson, and correct any interpretation or errors that were present on those documents. The ESSA representatives opted in favor of ESSA doing the charting on the latest ESSA charts and presenting these representations to the Ad Hoc Committee for comment. The representative of the Department of Justice indicated that this would necessitate a great deal of time that was not available in light of the present needs of reporting at least tentative U.S. baselines that could be used in pending domestic litigation and with respect to problems existing in the international sphere.

It was finally agreed that the committee begin its work using Dr. Hodgson's charts, some of which are several years out of date, and present its results to ESSA for recharting on its latest chart. These documents would then be presented to the committee for review and any additional comments which the committee deemed it necessary to make.

The first task taken up by the committee was a review of the Gulf of Mexico baselines. This review was initiated at the present meeting and will be continued at the next regular weekly meeting.

The Chairman of the committee introduced a request from Mr. Stevenson's office that the committee interrupt its present schedule and take up the question of Alaskan baselines in light of a request from Senator Stevens' office for an opinion on the effect of the President's sealed decision on the Alaskan continental shelf. The committee agreed that this request would be honored. The meeting was then adjourned.

ATTACHMENT 13

LETTER OF JUNE 6, 1972 FROM THE JUSTICE DEPARTMENT TO THE INTERIOR DEPARTMENT

(MISSISSIPPI EXHIBIT 101)

June 6, 1972

Mr. Francis A. Cotter
Office of the Solicitor
Department of the Interior

Jonathan I. Charney
Chief, Marine Resources Section
Land and Natural Resources Division

Proposed Leasing Maps in the Gulf of Mexico

In a memorandum dated May 2, 1972, Mr. Clark Gumm, Chief, Division of Cadastral Surveys of the Bureau of Land Management, requested my comments on proposed leasing maps in the Gulf of Mexico that were enclosed. You have asked me to send my comments to you.

I understand that these documents have been reviewed by Dr. Hodgson of the Department of State to see whether the baseline used for these leasing maps conformed with the baseline used on the Law of the Sea Task Force Documents. Dr. Hodgson has told me that the only difference is the treatment of Mississippi and Chandeleur Sounds.

I have reviewed these leasing maps to see whether they will raise any problems in our litigation. With respect to the maps covering the Florida coast I see that there has been no blocking of any area which has been put in issue in our suit with Florida. *United States v. Florida*, S.Ct., No. 52, Original.

The only place where a problem arises is found on the Mobile Leasing Map. The difference between the leasing map and the Task Force documents raises the question as to the status of Mississippi and Chandeleur Sounds. Although the State Department takes the position that Chandeleur Sound is for the most part high seas, in the early part of our litigation with Louisiana the Department of Justice took the position that it was internal waters on the theory that it was a fictitious bay. Although this theory was discredited by the Supreme Court in 1965, *United States v. California*, 381 U.S. 139 at 170-172, it was decided that, in the interests

of comity with the State, it would be better not to change our litigation position. Accordingly, on January 21, 1971, we entered into a stipulation with the State agreeing that we would not claim that the seabed of Chandeleur Sound was on the outer continental shelf. That stipulation is attached.

No such stipulation or reliance has taken place with respect to the rights of Mississippi and Alabama in Mississippi Sound and, if pressed, I would assume that we would take the position that the limit of the States' rights is the 3-mile limit shown on the Task Force Documents. However, due to the status of our other litigation, we believe that we should not litigate this question now.

The issuance of the leasing map of Mobile Bay as drafted might begin the process of reliance or, if conformed to the Task Force Documents, litigation. It would be better, from our standpoint, to avoid any implication as to the limits of State rights in Mississippi Sound. This could be done by using an artificial northern limit of the area blocked. One such limit could be the grid line of Y - 10,945,440.00′ where it is seaward of the 3-mile limit. This is a convenient line because north of that line there are only a number of partial blocks and one whole block. This northern limit could begin just west of X - 1,298,880.00′.

It has been suggested that the map be published as drafted but with the addition of a caveat indicating that there is no implication as to the ultimate landward limit of the outer continental shelf. I believe that this is a bad idea. All too many times in our litigation have such qualified maps been introduced as proof of just what they disclaim to be.

I would be happy to speak to you further on this matter if you wish.

cc: Mr. Clark L. Gumm
Chief, Division of Cadastral Surveys
Bureau of Land Management
Department of the Interior
Washington, D.C.

Dr. Robert D. Hodgson
Geographer
Department of State
Washington, D.C.

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Office of the Legal Adviser
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ATTACHMENT 14

TESTIMONY ON THE FISHERY CONSERVATION AND MANAGEMENT ACT

(JOINT EXHIBIT 107)

United States Department of Commerce
National Oceanic and Atmospheric
National Marine Fisheries Service
Southeast Region
9450 Koger Boulevard
St. Petersburg, FL 33702

September 28, 1981

TO: Executive Directors
Southeast Regional Fishery Management
Councils

FROM: F/SER - Carol B. Fowler

SUBJECT: Hearing on the Magnuson Fishery
Conservation and Management Act of 1976
and Proposed Tuna Amendment

Please find attached the testimony of William G. Gordon, Deputy Assistant Administrator for Fisheries, NOAA, before the House Committee on Merchant Marine and Fisheries, Subcommittee on Fisheries and Wildlife Conservation and the Environment on the MFCMA of 1976.

• • • • • • • • • • •

Issue 1: FCZ Enclaves in State Waters

In several places along the coastline of the United States there are small portions of the Fishery Conservation Zone (FCZ) which are totally, or almost totally, surrounded by the territorial sea. For the most part, these enclaves are found in areas where barrier islands are situated more than six miles from the mainland.

The Magnuson Act left management authority for the territorial sea with the adjacent coastal State unless the Secretary of Commerce invoked the preemption proce-

dures of section 306(b). State management efforts may be complicated if Federal FMP regulations for the FCZ enclaves differ from the State measures to be enforced in the surrounding territorial sea. A State prosecutor might, for example, have to prove that fish, illegal if harvested in the territorial sea, were not harvested from the Federal enclaves. This would be difficult to establish "beyond a reasonable doubt" unless the fishing operations were under continuous observation by the State enforcement officers. Because some of these enclaves hold valuable mineral resources, the Administration will not support ceding these areas to the adjacent States. We are, however, prepared to transfer fishery management jurisdiction, subject to the Secretary's continuing ability to invoke preemption. Our legal staff would be pleased to work with committee staff to develop the necessary language. In the absence of legislation, we have advised the appropriate Councils that unwarrented interference with State management efforts can be avoided by deleting these FCZ enclaves from the geographic scope of their management plans or conforming the FMP measures for these areas to existing State law. In this manner, States will be able to continue enforcing their laws against vessels they have registered without unwarranted Federal interference.

ATTACHMENT 15

PEARCY, *MEASUREMENT OF THE U.S. TERRITORIAL SEA*

(JOINT EXHIBIT 8)

Bays, because of the placement of islands in the vicinity of their entrances, may have several channels of ingress. Under such circumstances an individual closing line is drawn across each entrance. To be identified as a bay, the area of water thus closed off must be as large as, or larger than that of a semicircle the diameter of which is equal to the sum total of the individual closing lines. A bay with islands which give it five entrances is shown in figure 4. Situations of this kind abound along some portions of the coast. The one of most impressive dimensions is Mississippi Sound, partially closed off by a series of sandy islands.

Joint Exhibit 8 at 965

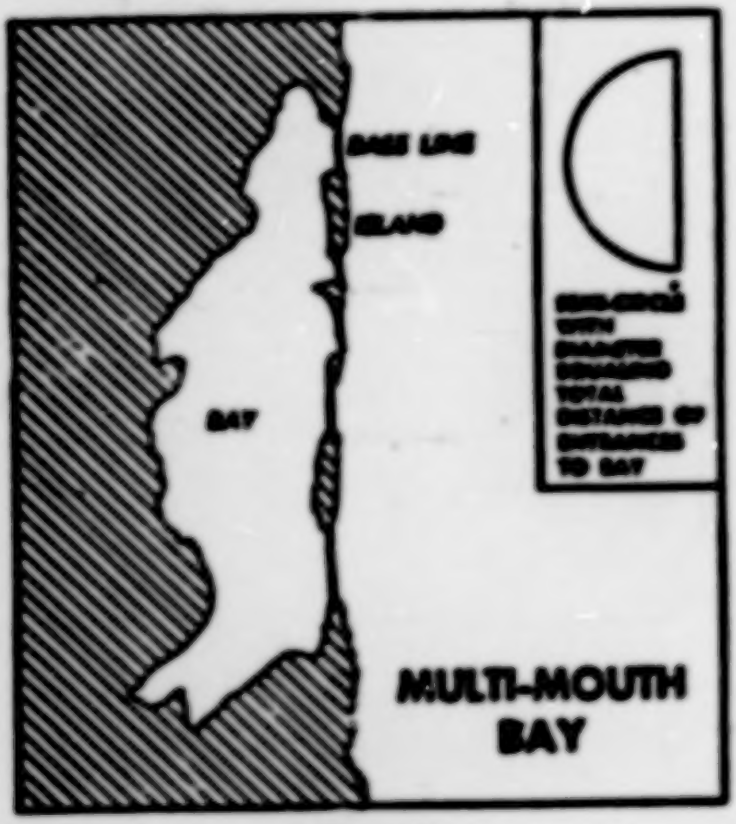


Figure 4

Office-Supreme Court, U.S.
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CLERK

8183

No. 9, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, et al.
(Alabama and Mississippi Boundary Cases)

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES

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AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES

INTEREST OF THE STATE OF ALASKA

The State of Alaska is before this Court in another action (*United States v. Alaska*, No. 84, Original) to determine the extent of the submerged lands owned by the State along its north slope. A trial before the Special Master of certain issues in that action (primarily whether a formation known as Dinkum Sands constitutes an island for purposes of delimiting Alaska's submerged lands boundary) began on July 16, 1984, and concluded August 2. A subsequent trial on other issues in the case, including the application of straight baselines, is contemplated later this year or early in 1985.

Owing to the significant impact that the Court's decision and statements in this case may have on Alaska's case, the State has a substantial interest in the outcome of this

proceeding and must, therefore, address certain points raised by the report of the Special Master and briefs of the parties.

INTRODUCTION AND SUMMARY

The State of Alaska is confronted with federal claims to submerged lands similar to those encountered by other coastal states. The United States confirmed in Alaska upon the State's admission to the Union rights equal to those enjoyed by most other coastal states in its offshore territory. See Alaska Statehood Act, Pub. L. No. 85-503, §§ 2, 6(m) 72 Stat. 339 (1958). Alaska has been sued by the United States, in this Court's original jurisdiction, over those rights, and the Court has referred the case to a special master. 444 U.S. 1065. The *Alaska* case concerns the northern seaward boundaries of the State of Alaska from Icy Cape, southwest of Point Barrow, to the Canadian border. That segment of Alaska's coastline is nearly as long as the entire California coastline.

The national Government has been accorded in the submerged lands cases exceptional deference—some would say inordinate deference[1]—to the position it elects on the particular occasion to take. Given that fact, and given the pendency of the *Alaska* case, which raises questions related to those raised by the United States in its Exception and by the Special Master in his Report in this case, Alaska desires to correct certain flawed or misleading points in the Exception and Report lest they go unquestioned now and cause unnecessary problems in the *Alaska* case.

---

[1]Charney, Judicial Deference in the Submerged Land Cases, 7 Vand. J. Trans. L. 383 (1974).

Generally, we endorse the Special Master's decision that Mississippi Sound is both a juridical bay and a historic bay under the criteria established by the Court. In two respects, which are not essential to that decision, however, the Special Master briefly touches on subjects of vital importance in the *Alaska* case: (1) the United States policy of assimilating "objectionable pockets of high seas"[2] and (2) the application of straight baselines. In its Exception, the United States glosses over these subjects in a footnote. Exception 6, n. 2.

First, in an introductory paragraph, the Special Master declines to assimilate the enclaves in Mississippi Sound to the territorial sea, preferring instead to determine the issue under the rules for juridical and historic bays. The Master's passing treatment of this subject, however, does not take note of the critical fact that the official policy of the United States from 1930 until at least 1961 was to assimilate objectionable pockets of high seas. Moreover, the Special Master mistakenly suggests that the 1930 Hague Conference and the International Law Commission rejected such assimilation policies. The Solicitor General understandably neglects to correct these errors; thus, we point them out and briefly describe the factual background of this issue, which will be fully developed in the *Alaska* case.

Second, the Special Master declines to apply a system of straight baselines to delimit Alabama's and Mississippi's submerged lands. The Special Master's brief discussion of this subject (fewer than three pages) is devoid of any factual examination. There appear to be two reasons for

---

[2]See Boggs, Delimitation of the Terminal Sea, 24 Am. J. Int'l L. 541 (1930).

this insubstantial treatment of the issue: (1) The Master expressly recognized that, in light of his decision that Mississippi Sound is both a juridical and historic bay, any decision on straight baselines was inconsequential and (2) the Master felt that language from prior opinions of the Court precluded the particular arguments advanced by Alabama and Mississippi. We point out that the Court's prior opinions are not quite so confining and that the Master did not mention certain critical pronouncements by the Court. Additionally, in light of the Special Master's resolution of this case under the rules for juridical and historic bays, and the consequent curtailed treatment of straight baselines, Alaska notes that any significant decision or discussion regarding straight baselines by the Court may be better made in the pending *Alaska* case, where the issue will be squarely and fully addressed.

The Special Master's conclusion that the submerged lands of Mississippi Sound belong to Mississippi and Alabama is supported by two considerations which receive no mention in his Report. The first is that the Submerged Lands Act, except in the case of islands far removed from the mainland coast, contemplated a single, contiguous legal boundary. In the present case, it would do violence to the clear intent of Congress to hold the United States to own isolated "enclaves" of submerged lands wholly surrounded by state-owned lands.

The second consideration is that the Submerged Lands Act was intended not merely as a grant of certain described lands, but as an extension of the equal footing doctrine to those lands. Since Louisiana has been held to own the "enclaves" of submerged lands lying between its mainland

coast and the Chandeleur Islands, a different result in the present case would put Mississippi and Alabama on an unequal footing with their sister Gulf state. These points are treated in parts C and D of this brief.

Finally, in a point that has acute importance for the late-admitted State of Alaska, we observe that the Executive has no power, whether through its foreign relations or through its management of federal resources, to alter the Congressionally approved boundaries of a state. The result the United States seeks in this case would have precisely that effect.

ARGUMENT

A. When Alaska Became A State And Acquired The Submerged Lands Beneath The Territorial Sea Off Its Coasts, The Official Position Of The United States Was To Assimilate "Objectionable Pockets" Of High Seas To The Territorial Sea; The Alaska Statehood Act Expressly Defines The State As "All The Territory, Together With The Territorial Waters Appurtenant Thereto, Now Included In The Territory of Alaska"

Alaska will show, when its case is tried before the Special Master and later briefed before this Court, that, by virtue of the United States policy of assimilating "objectionable pockets of high seas" to the territorial sea, the United States granted to Alaska the submerged lands beneath such so-called pockets of high seas off Alaska's coasts. Upon admission to the Union on January 3, 1959, Alaska acquired, by Congressional grant, the submerged lands beneath the territorial sea off its coasts. Pub. L. 85-508, 72 Stat. 339 (1958). The territorial sea, under the official position of the United States at that time, included the pockets

of ostensible high seas that would be produced by rigid application of the arcs-of-circles method of delimitation. The State, thus, acquired the submerged lands beneath such pockets.

Subsequent policy changes by the Executive regarding delimitation of the territorial sea did not, and constitutionally could not, divest Alaska of submerged lands previously granted by Congress. The United States maintained its policy of assimilating objectionable pockets of high seas from 1930, when the United States proposed articles regarding such assimilation to the Hague Conference, to at least 1961, when the United States ratified the Geneva Convention on the Territorial Sea and the contiguous Zone. This much is readily documented. It remains, moreover, open to question whether and how long the United States maintained its assimilation policy thereafter, since that policy produces territorial seas well within the geographic limits authorized by the Convention. In any event, whenever the United States changed its policy, that change did not divest Alaska—or Mississippi or Alabama—of Congressionally granted submerged lands. Only the whole Congress can establish a state's boundaries or dispose of territory within a state, not the federal Executive either acting alone or with the advice and consent of the Senate ostensibly in the name of foreign relations. U.S. Const., art. II, § 3; *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

In this case, the Special Master briefly addresses contentions by Alabama and Mississippi regarding assimilation of enclaves of high seas. Unlike Alaska's position, however, these contentions, as described by the Master, appear to treat the matter as a current policy question, rather than

a question of the historical facts of actual United States policy.

The distinction is crucial. The Master does not even note that the official policy of the United States for more than 30 years was to assimilate such enclaves, although he does recognize and confirm that the United States adhered to the 10-mile closing rule for fringing islands. Report 5-6. Without considering the historical facts or their legal and constitutional implications, the Master assumes the case is governed by the Geneva Convention. While the Convention may usefully serve to supply rules and definitions in certain circumstances, *United States v. California*, 381 U.S. 139 (1965); *United States v. Louisiana*, 394 U.S. 11 (1969), it may not be used to turn back the hand of time and, in contravention of the Constitution, repeal the effect of history.

The Special Master also mistakenly notes that the 1930 Hague Conference and the International Law Commission considered and rejected proposals for the assimilation of pockets of high seas. The 1930 Hague Conference did not reject such an assimilation proposal. The United States presented a detailed assimilation proposal to the Conference on March 27, 1930. The work of the subcommittee to which the proposal was referred was stymied, however, by the failure of the Conference to reach agreement on the breadth of the territorial sea. In fact, the Second Committee of the Conference was prevented by that failure of agreement from making even a provisional decision on the articles drawn up by the subcommittee. Report of the Second Commission (Territorial Sea), League of Nations Doc. C.230.M.117.1930.V. (1930). The incomplete work of the

Hague Conference can hardly be characterized as a rejection of the United States proposal.

Similarly, the International Law Commission did not reject the United States assimilation proposal. Indeed, the United States did not even present such a proposal to the Commission. Assimilation of enclaves was considered by the Commission over a period of years only in connection with the proposed article on straits; as finally reported, that article did not include an assimilation provision. The much more comprehensive United States policy was not discussed and, accordingly, never rejected. And, in fact, from 1930 to 1961 the United States employed the methods set forth in the 1930 proposal for delimiting its territorial seas, as Alaska's evidence at the forthcoming evidentiary hearing on this question will show.

B. Because The Special Master's Brief Discussion Of Straight Baselines Is Unnecessary To The Decision, Any Decision Or Discussion On That Issue By The Court Should Be Made When The Question Is Fully Developed In The Alaska Case

The Special Master devotes barely more than two pages of his Report in this case to the issue of straight baselines, an issue of great importance in the pending *Alaska* case. The Master engages in no factual analysis and, instead, deems the state's arguments in this case completely foreclosed by language from prior opinions of the Court. Important to the Master's discussion on straight baselines was his recognition that acceptance of present United States policy on that question "has resulted in no contraction of the recognized territory of the States of Alabama and Mississippi for reasons that will hereafter appear." Report 7.

Those reasons, of course, were that Mississippi Sound was both a juridical and a historic bay. The Master's conclusions regarding straight baselines were, thus, of no consequence to the territorial boundaries of the states and, in fact, were unnecessary to the Master's ultimate decision.

Moreover, the Special Master's passing treatment of straight baselines in this case disregards certain critical pronouncements by the Court. Relying on language from *United States v. California*, 381 U.S. 139 (1965) and *United States v. Louisiana*, 394 U.S. 11 (1969), the Master cut short his inquiry into the straight baselines issue, feeling that the states' arguments are completely foreclosed. Disregarded in the Master's discussion, however, is the express admonition in *United States v. Louisiana* that the Court did *not* mean to preclude a state from arguing that the United States had actually employed a system of straight baselines and later sought to abandon that policy solely to gain advantage in a lawsuit with the state:

> It might be argued that the United States' concession [in earlier stages of the litigation that areas between the mainland and all offshore islands were inland waters] reflected its firm and continuing international policy to enclose inland waters within island fringes. It is not contended at this time, however, that the United States has taken that posture in its international relations to such an extent that it could be said to have, in effect, utilized the straight baseline approach sanctioned by Article 4 of the Convention. If that had been the consistent international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana. Cf. United States v California, 381 US 139, 168, 14 L Ed 2d 296, 314, 85 S Ct 1401: "[A] contraction of a State's recognized territory imposed by the Federal

> Government in the name of foreign policy would be highly questionable." We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone.
>
> *United States v. Louisiana*, 394 U.S. at p. 48, n. 97.

Because the Special Master mistakenly failed to consider and weigh the arguments and evidence presented on straight baselines, and because the Master's abbreviated discussion of that issue is unnecessary to the decision in this case, Alaska submits that the Court should await the pending *Alaska* case for making any decision or pronouncement regarding straight baselines. In the *Alaska* case, the issue will be squarely presented and fully developed both at trial and in the briefs to the Court. Indeed, Alaska will present evidence at that time demonstrating that the United States long ago would have adopted a system of straight baselines for the purpose of delimiting its coastline but for the effect such adoption would have on litigation with the several coastal states regarding the Submerged Lands Act.

C. The Submerged Lands Act Granted To The States All The Submerged Lands Between The States' Most Seaward Contiguous Boundary And The Mainland, Even If Some Of Those Submerged Lands Are Slightly More Than Three Miles From The Line Of Ordinary Low Water Along The Mainland Or Nearby Barrier Islands

In section 3(a) of the Submerged Lands Act, 43 U.S.C. § 1311(a), Congress granted to the states all "the lands beneath navigable waters within the boundaries of the

respective States." With respect to offshore submerged lands, sections 2(a)(2) defines the term "lands beneath navigable waters" as including all lands from the line of mean high tide "seaward to a line three geographical miles distant from the coast line of each such State and to the boundary of each such State where in any case such boundary . . . extends seaward (or into the Gulf of Mexico) beyond three geographical miles." In turn, section 2(c), 43 U.S.C. § 1301(c), defines the term "coast line" as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." And section 2(b), 43 U.S.C. § 1301(b), defines "boundaries" as including a state's historical boundaries, but places a limitation on the distance those boundaries may extend from the coast line: "In no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico."

On a straight mainland coast with no offshore islands, boundary delimitation under the Submerged Lands Act is relatively simple. Where barrier islands exist between the mainland and the open sea, however, as in the case of Mississippi and Alabama, the task becomes more complex.

None of the water entrances from the Gulf of Mexico into Mississippi Sound exceeds six miles—*i.e.*, the distance between each of the barrier islands which separate Mississippi Sound from the "open sea" of the Gulf of Mexico is less than six miles, as is the distance between the mainland and the islands at either end of the chain. However, a

literal application *of* a three-mile limitation produces a small "enclave" or "pocket" of submerged lands totally surrounded by submerged lands that undisputedly belong to Alabama and Mississippi.

The United States claims that the Submerged Lands Act requires a literal application *of* the three-mile limitation on a state's boundaries, whether measured from the ordinary low water mark on the mainland, *or* from that on offshore barrier islands. The Act, however, simply cannot be construed to reach such a result.

First, section 3(a) vests in the several coastal states the "title to and ownership *of* the lands beneath navigable waters *within the boundaries of* the respective States." (Emphasis added.) As a matter *of* simple geography, there can be no dispute that such "enclaves" or "pockets" lie within the *exterior* boundaries *of* the states.

Second, section 2(a)(2) provides that the "lands within navigable waters" conveyed to the states are those which lie between the line *of* mean high tide and "*a line* three geographical miles distant from the coast line." (Emphasis added.) The Act uses the singular term, "a line," rather than a more open-ended designation (such as "any line"), implying that there is but one seaward boundary line for each state (at least where the water entrances between the mainland and various barrier islands do not exceed a total *of* six miles). Similarly, section 4 *of* the Act, 43 U.S.C. § 1312, speaks in terms of a single "seaward boundary . . . as *a line* three geographical miles distant from its coast line."

Finally, any doubt is eliminated by the definition of the term "coast line" in section 2(c): "The term 'coast line' means the line of ordinary low water *along that portion of the coast which is in direct contact with the open sea* and the line marking the seaward limit of inland waters." (Emphasis added.) Where, as in Mississippi Sound, there is a chain of barrier islands, neither the coast of the mainland nor the landward coasts of the barrier islands are "in direct contact with the open sea." Such a characterization applies only to the seaward coasts *of* the barrier islands. Under this definition of "coast line," the "line three geographical miles distant from the coast line"—the line which marks the outer limit of the "lands beneath navigable waters" conveyed to the states—is a three-mile line drawn only from the seaward coasts *of* the barrier islands, at least where (as is the case in *Mississippi Sound*) the water entrances between the mainland and the several barrier islands nowhere exceed six miles.

The United States apparently argues that the three-mile limitation on the extension of seaward boundaries from the coast line, contained in section 2(b) of the Act, compels the conclusion that the states' boundaries (and therefore the extent of the grant) in no event can exceed three miles, regardless of other geographical circumstances. However, the limitation goes only to a boundary "extending from the coast line more than three geographical miles *into the Atlantic Ocean or the Pacific Ocean*, or more than three marine leagues *into the Gulf of Mexico*" (emphasis added)—*i.e.*, into the "open sea." Neither Mississippi's nor Alabama's boundary must be extended more than three marine leagues—or even more than three geographical miles—into the Gulf of Mexico to include within their

boundaries the submerged lands underlying Mississippi Sound. While there are submerged lands within the Sound which are more than three geographical miles from the lines of ordinary low water along the mainland and the landward side of the barrier islands, all of those submerged lands are within the states' seaward boundaries—*i.e.*, the single contiguous boundary measured from that portion of the mainland and the barrier islands "in direct contact with the open sea."

Indeed, for the United States to prevail in this action, this Court must effectively rewrite the Submerged Lands Act in a number of respects. It must modify the definition of "lands beneath navigable waters" in section 2(a)(2) so as to include only those lands between the line of mean high tide and "*any* line three geographical miles distant from the coast line of each such State." Second, it must modify the three-mile limitation in section 2(b) to embrace not only the Atlantic and Pacific Oceans and the Gulf of Mexico, but as well "any other subordinate body of water." Finally, section 2(c) would have to be construed to read:

> The term "coast line" means the line of ordinary low water along that portion of the coast *of the main continent* which is in direct contact with the open sea and the line marking the seaward limit of inland waters, *and in the case of any island seaward of such coast, means the line of ordinary low water around such island.*

To reach this last result, however, the Court must do what Congress refused to do.

In the Senate floor debate on the Submerged Lands Act, Senator Douglas moved to amend the definition of "coast line" to read precisely as set out above. 99 Cong. Rec. 4240.

As the ensuing colloquy makes clear, Senator Douglas was concerned that the definition of "coast line" would permit expansive claims to be made by the various states where there were islands a substantial distance from the mainland —what Senator Douglas termed "remote islands" such as those lying off the coast of California. *Id.* Indeed, this Court has characterized Senator Douglas's amendment as addressing that precise circumstance: "Senator Douglas introduced amendments specifically designed to prevent States from claiming as inland waters those water areas between the mainland and *remote islands.*" *United States v. California*, 381 U.S. 139, 158 n.23 (emphasis added). Even Senator Douglas was, quite apparently, not attempting to address islands in close proximity to the mainland. *See* 99 Cong. Rec. 4242 (comments of Senator Douglas).

Commenting on the debate over Senator Douglas's amendment, this Court has noted that "[t]he colloquy leading to the rejection of these amendments is extremely revealing in the total absence of hostility to the basic idea which Senator Douglas was pursuing . . ." *United States v. California*, 381 U.S. at 158 n.23. Alaska agrees; there is little question that Congress did not contemplate remote islands serving as the basis for a state claim to all of the water areas between the mainland and those islands. However, there can be little question that Congress did contemplate the presence of near-shore barrier islands resulting in the states receiving title to the submerged land underlying intervening waters: Senator Douglas's amendment was defeated on a vote of 50 to 26, 99 Cong. Rec. 4243, primarily because of the effect such an amendment would have on Gulf state claims to submerged lands between the

mainland and near-shore barrier islands. *See* 99 Cong. Rec. 4241-4242 (comments of Senators Long, Daniel and Holland).

To the extent there may be any question regarding Congressional intent in this regard, the provisions of the Outer Continental Shelf Lands Act, Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. §§ 1331 *et seq.*, make clear that "enclaves" or "pockets" of submerged lands more than three miles from the ordinary low water lines on the coast of the mainland and offshore islands, but completely surrounded by submerged lands less than three miles from such lines, belong to the states. Section 2(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a), defines the term "outer Continental Shelf" as "all submerged lands lying *seaward and outside of* the area of lands beneath navigable waters as defined in section 1301 of this title." (Emphasis added.) Even the most creative sophistry cannot characterize such "enclaves" or "pockets" of submerged lands as "lying seaward and outside" of the lands granted to the states under the Submerged Lands Act.

It is not surprising that Congress reached this result, since it was simply adopting the same method of delimitation which the United States used to delimit the territorial sea in its foreign relations. S. Whitmore Boggs, the Geographer for the Department of State, testified before the Senate Interior and Insular Affairs Committee in February 1951 that the United States "assimilated" such "enclaves" or "pockets" to the United States' territorial sea. Hearings on S.J. Res. 20 [providing for a continuation of oil and gas leases and operations on submerged lands], February 19-22, 1951, including conferences with Executive Departments on S. 940 ["quitclaim" of submerged lands], March 28 and

April 10, 1951, pp. 440-467 (April 10, 1951). According to Mr. Boggs, a literal application of a three-mile limitation, when delimiting the territorial sea, may result in "peculiar anomalies, with pockets of high seas," which then should be assimilated. *Id.*, p. 462. The assimilation doctrine is explained at greater length in two of Mr. Boggs' articles[*] included in the appendix to the hearing transcript.

Further, there is little doubt that the executive branch of the federal government considered such "enclaves" or "pockets" as having been included in the grant of lands to the states under the Submerged Lands Act. *See*, e.g., Joint Exhibit JT-64, in which then-Secretary of the Interior Oscar P. Chapman construed the boundary between state-owned submerged lands and federally-owned outer continental shelf as being three miles from the seaward coast line of the barrier islands forming Mississippi Sound. *Also see* the United States' concession in *United States v. Louisiana*, 363 U.S. 1, 66-67 n.108 (1960), that Louisiana was entitled to all the lands between the mainland and the barrier islands within three leagues of Louisiana's mainland.

Indeed, it was not until the early 1970s that the federal government began to contemplate the position it is urging in this case—*i.e.*, that such "enclaves" or "pockets" did not pass to the states under the Submerged Lands Act but instead are subject to the federal government's jurisdiction under the Outer Continental Shelf Lands Act. Even then, however, it was considered too unseemly to press the argument until more time had passed. *See* Mississippi Exhibit

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[*]Boggs, Delimitation of the Territorial Sea, 24 Am. J. Int'l L. 541 (1335), and Boggs, Delimitation of Seaward Areas Under National Jurisdiction, 45 Am. J. Int'l L. 240 (1951).

101, a memorandum from Jonathan I. Charney of the Justice Department dated June 6, 1972, suggesting that the argument not be raised until more time had passed.

Apparently, the United States now has determined that sufficient time has passed to blur the otherwise clear language of the Submerged Lands Act, the Outer Continental Shelf Lands Act and the administrative construction placed on both. In addition, it is apparent that the United States is banking substantially on the deference which this Court has indicated it will give to the United States' foreign policy position, a position which Alaska will show in its forthcoming trial on the straight baseline question has been adopted solely to minimize the grant of submerged lands to the states under the Submerged Lands Act and not for bona fide foreign policy purposes. To the extent, however, that the federal government's interpretation is entitled to some deference, its initial construction is entitled to more deference. After all, it is the government's contemporaneous construction which carries persuasive weight. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). "The [government's] current interpretation, being in conflict with its initial position, is entitled to considerably less deference." *Watt v. Alaska*, 451 U.S. 259, 273 (1981), citing *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

Under these circumstances, the Court could affirm the Special Master's decision that Alabama and Mississippi own all the submerged lands underlying Mississipi Sound on the independent ground that the Submerged Lands Act granted to Alabama and Mississippi all the submerged lands landward of their most seaward contiguous boundaries, including those underlying Mississippi Sound.

D. Since The Submerged Lands Act Was An Extension Of The Equal Footing Doctrine To Offshore Submerged Lands, Mississippi And Alabama Cannot Be Treated In A Manner Which Differs From That Afforded Their Sister State, Louisiana

As this Court noted in *United States v. California*, 436 U.S. 32, 37 (1978), "[t]he very purpose of the Submerged Lands Act was to undo the effect of this court's 1947 decision in *United States v. California*, 332 U.S. 19 [1947]." In other words, the Act was a congressional extension of the equal footing doctrine to the submerged lands underlying the territorial sea, lands that prior to the 1947 California decision were "assumed by many, and not without reason," to fall within the doctrine. *United States v. Louisiana*, 363 U.S. 1, 16 (1959); *see* Submerged Lands Act legislative history set out in 363 U.S. at 16-24.

There is no question that Louisiana owns the submerged lands between its mainland coast and the barrier islands lying fewer than three leagues offshore. *See United States v. Louisiana*, 363 U.S. at 66-67 n.108. Indeed, the federal government conceded the point at that time, *id.*, and later declined to withdraw that concession (at least with respect to the area consisting of Chandeleur Sound and Breton Sound). *United States v. Louisiana*, 394 U.S. 11, 66-67 n.87 (1969).

It would be anomalous indeed to hold that the congressional extension of the equal footing doctrine to offshore submerged lands granted Louisiana title to submerged lands between the mainland and offshore barrier islands, but granted no such title to Alabama and Mississippi. This

is particularly true where the geographic facts—the "enclaves" in controversy are completely surrounded by submerged lands undisputedly belonging to Alabama and Mississippi—are so compelling.

E. The Executive May Not, Without The Approval Of Congress, Renounce A State's Claim To Lands Within The State's Boundaries

Only Congress can establish a state's boundaries or dispose of territory within a state, not the Executive either acting alone or with the advice and consent of the Senate ostensibly in the name of foreign relations. *United States v. Louisiana*, 363 U.S. 1, 35 (1960). The United States Constitution vests such power in Congress:

> New States may be admitted by the congress into this Union . . .
>
> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.
>
> U.S. Const., art. IV, § 3, cl. 1 & 2.

When Alaska became a state in 1959 and acquired the submerged lands beneath the territorial sea off its coasts, the United States maintained a long-standing official policy of assimilating to the territorial sea enclaves of high seas that would be produced by using the ares-of-circles method of delimitation. The State of Alaska, therefore, acquired as part of its Congressionally-granted territory the submerged lands beneath such enclaves.

Subsequent policy changes by the Executive regarding delimitation of the territorial sea did not, and constitutionally could not, divest Alaska—or any other state—of the submerged lands previously granted by Congress. Certainly, the treaty power may not be used to cede the territory of a state in circumvention of the Constitution. *De Geofroy v. Riggs*, 133 U.S. 258 (1890). It should be noted, moreover, that Article IV, section 3, clause 2, of the Constitution not only sets forth the power of Congress over the disposition of territory, it expressly protects the territorial rights of the states. A state's territory, therefore, cannot be ceded without its consent. As the Court remarked in *De Geofroy v. Riggs*, *supra*:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of all government itself and of that of the States. *It would not be contended that it extends so far as to authorize* what the Constitution forbids, or a change in the character of the government, or in that of one of the States, or *a cession of any portion of the territory of the latter, without its consent.*
>
> *Id.* at 267, emphasis added.

Since Congress has not passed and the President has not signed any legislation purporting to disclaim some of the territory granted to the states under the Submerged Lands Act, it is manifest that under the Constitution the states retain all of their territory, including submerged lands beneath the so-called enclaves of high seas, notwithstanding any recent policy changes by the Executive with respect to such enclaves.

CONCLUSION

Alaska supports the Special Master's decision that Mississippi Sound is both a juridical and a historic bay. We note, however, that the Master's Report contains some mistaken or misleading statements regarding (1) assimilation of enclaves of high seas and (2) straight baselines. None of these statements is necessary to the decision. Accordingly, we submit that any significant decision or discussion by the Court regarding these issues may better be made in the pending *Alaska* case.

Respectfully submitted,

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